(1)
Supreme Court, U.S.
FILED
95 178 JUL 26 1995
OFFICE OF THE CLERK

No. _____

IN THE
Supreme Court of the United States
October Term, 1995

CHARLES BEN HOWELL, *Petitioner*
v
OSCAR MAUZY, ET AL., *Respondents.*

ON PETITION FOR WRIT OF CERTIORARI
TO THE
SUPREME COURT OF TEXAS

PETITION FOR WRIT OF CERTIORARI

PETITIONER'S APPENDIX, VOLUME I
(Pages PA1-PA42)

PETER L. BARGMANN
Counsel of Record
For Petitioner
12700 Park Central Drive
Suite 508
Dallas, Texas 404-9800
(214) 404-9800

Of Counsel:
ROBERT J. [illegible]AGAN
CONSUELO RICS
Dallas, Texas

TREVATHAN PRESS • LITTLE ROCK

91PP

QUESTIONS PRESENTED

First Question:

Were any of the seven justices under challenge subject to disqualification under the his-own-case rule pronounced in *Murchison* and directly applied to state appellate courts by *Aetna v. Lavoie?*

(1) This is an action seeking statutory double damages and injunctive relief under the Texas Campaign Disclosure Act (CDA) brought against a (now former) justice of the Texas Supreme Court. Being elective officials, all judges, including the state Supreme Court justices here under challenge are obligated to file CDA reports. Inasmuch as all of the Justices under challenge have arguably or tacitly approved, in the case *sub judice*, the *sub silentio* re-vitalization of the strict-construction-against-the-penalty rule of CDA construction—so recently rejected by the Texas Supreme Court itself; and, inasmuch as their own judicial action has served to reduce their personal exposure to CDA double damage liability, have the challenged justices not acted in their own case? Is this not particularly true with respect to the Honorable Justice Enoch against whom claims for CDA violation are currently pending?

(2) In this CDA action against a former state supreme court justice, petitioner urges the "ultimate provider rule." That is to say, petitioner contends that respondent's CDA expenditure reports are insufficient because they list only the names of credit card compa-

nies, or conclusorily report disbursements to "cash," "travel," "entertainment," etc. Petitioner has challenged three state supreme court justices (the Honorable Justices Gonzalez, Hightower, and Spector) as disqualified because their own individual reports reflect the same or similar infractions. Inasmuch as such three justices have arguably or tacitly rejected petitioner's claims against respondent for violations that could arguably be asserted against themselves, have the challenged justices not acted in their own case?

(3) In this CDA action against a former state supreme court justice, petitioner urges that respondent has violated CDA "anti-pocketing" provisions prohibiting the diversion of campaign funds to personal use. The opinion and judgment which petitioner seeks to reverse has held that an opposing candidate is entitled neither to injunction nor double damages with respect to anti-pocketing violations. Petitioner has challenged one of the state supreme court justices (the Honorable Justice Gonzalez), as disqualified because his own individual reports reflect the same or similar infraction. Likewise, the Honorable Justice Enoch faces suit for the "pocketing" of state services and state materials. Inasmuch as such justices have arguably or tacitly rejected petitioner's claims against respondent for violations that could arguably be asserted against themselves, have the challenged justices not acted in their own cases?

(4) In this CDA action against a former state supreme court justice, petitioner urges that reporting through the use of various "Pet PAC" arrangements is insuffi-

cient thereby creating CDA liability for double damages and injunction. The term "Pet PAC" refers to ostensibly independent political action committees operating in concert with the candidate. Petitioner has challenged four of the state supreme court justices (the Honorable Justices Gonzalez, Hecht, Gammage and Enoch), as disqualified because their own individual reports reflect the same or similar infractions; *i.e.*, operating through Pet PAC's thereby obfuscating the nature and extent of the candidate's campaign activities and circumventing the requirement that the candidate personally swear to all of his activities. Inasmuch as such justices have arguably or tacitly rejected the petitioner's claims against respondent for violations that could arguably be asserted against themselves, have the challenged justices not acted in their own case?

Second Question:

Were any of the seven justices under challenge subject to disqualification under the financial interest (pecuniary interest) doctrine emanating from *Tumey v. OH* and continuously broadened to and through *Liljeberg v. Health Services?*

(1) Reference is here made to part (1) under Question 1. By approving the revitalization of strict-construction-against-the penalty, have the justices not effectively bought each of themselves a personal insurance policy protecting them from personal liability for money damages, injunctive actions and attorney's fee claims, all brought under the CDA, and respecting

both CDA reports now on file as well as those that the challenged justices will be required to file in the future?

(2) Reference is made to parts (2), (3), and (4) under Question 1. Have not the Honorable Justices named above, through their judicial action in this case, served to insulate themselves from personal liability for money damages, injunctive actions and attorney's fee claims, all brought under the CDA, and relating to the above mentioned infractions in connection with the ultimate provider rule, the anti-pocketing provisions, and their insufficient "Pet PAC" method of reporting?

(3) Considering that petitioner has been a candidate for the Texas Supreme Court at every election commencing in 1986; and considering that petitioner has been a declared opposing candidate against five of the seven justices under challenge, actually completing races against four of the said five; and viewing the matter in the light of petitioner's past performance, do not the challenged justices have reason to apprehend the likelihood that petitioner will be an opposition candidate against one or more of them at a future election? If so, is it not to the financial interest of the said justices to do what they can to prevent petitioner from prevailing in the instant case, thereby fueling the contention that petitioner has prosecuted a worthless claim for the purpose of harassing a political opponent, impugning petitioner before the electorate, and placing petitioner under pressure to discontinue his efforts to win a seat on the Texas Supreme Court? Under the totality of circumstances here shown, is

such financial interest not sufficiently direct and immediate to disqualify?

Third Question:

In the alternative, and viewing the circumstances alluded to under questions 1 & 2, are not the seven justices under challenge disqualified under the doctrine enunciated in *Gibson v. Berryhill* precluding a litigant from being tried by his competitors?

Fourth Question:

In refusing to disqualify itself or any of its members, did the Texas Supreme Court deprive petitioner of a Constitutionally acceptable tribunal?

(1) Where the record reflects that the opposing party was, until recently a member of the tribunal before which the case is pending and five of the seven justices under challenge were his judicial colleagues; and

(2) Also, where the record reflects that petitioner was a member of the minority political party, a lower court judge, a repeat candidate for election to the court considering the case, variously described as a perennial candidate, a controversial judge, and a maverick personality; and

(3) Also, where the record reflects that the justices presiding in the case were petitioner's past and present political opponents, where those justices have been embroiled with petitioner in past litigation, and

where petitioner had publicly directed against those justices, during the course of his political campaigns, pointed and barbed criticism; and,

(4) Also, where the record reflects that several of the justices under challenge had themselves committed the same infractions being charged by petitioner against the respondent to the case?

Fifth Question:

Is it necessary that petitioner show a majority of the Honorable Justices of the Texas Supreme Court to be disqualified in order to win reversal of that Court's rulings.

(1) Petitioner urges the disqualification of seven of the said Honorable Justices, more than a quorum of the nine. However, should the Supreme court not adopt the three-Justice concurrence in *Aetna v. Lavoie* urging that the participation of a disqualified justice in the proceedings of a multi-justice court should alone be sufficient grounds to vacate the final decision of such court.

2) Never-the-less, should the Supreme Court not, in any instance, before remanding, pass upon the disqualification claims urged against all seven of the Honorable Justices under challenge so that petitioner may have an impartial tribunal upon return to the Texas Supreme Court for further proceedings?

Sixth Question:

Should not the writ be granted to clarify the following corollary questions:

(1) Should the Supreme Court adopt a single unified test of constitutional disqualification: Are the circumstances such as to offer a temptation to the judge not to hold the balance nice, clear and true?

(2) Should the Supreme Court not adopt the 3-Justice concurrences in *Aetna v Lavoie*, 475 US 813 (86) as a rule of law? If so, do those concurrences not control this case?

(3) Should the Supreme Court not reject the *Lavoie* dicta indicating that the disqualification of state judges under the Fourteenth Amendment be limited only to cases where the challenged judge has an economic interest to be served by his rulings?

A. Even if such *Lavoie* dicta be correct, has petitioner not shown sufficient economic interest in the Texas Supreme Court and its justices to trigger Fourteenth Amendment disqualification?

(4) Even though this Court placed heavy reliance upon a federal statute, was not the decision in *Liljeberg v. Health Services*, 486 US 847, 108 SCT 2194 (88), of constitutional dimension?

A. If so, is there any basis for applying differing constitutional tests of disqualification to state and

federal judges?

B. If so, must *Liljeberg* not be read as a limitation upon the dicta of *Lavoie?*

C. If so, is petitioner's case not governed by the *Liljeberg* rule holding that inquiry concerning judicial disqualification must primarily concentrate upon the appearance of fairness and impartiality so as to promote public faith and confidence in the judiciary?

PARTIES

Charles Ben Howell, the sole petitioner before the Supreme Court, was the petitioner, the appellant and the plaintiff in the respective courts below. Respondents, having been appellees and defendants below were Oscar Mauzy; Oscar Mauzy, P.C.; Anne Mauzy; Oscar Mauzy Personal Private Individual Fund; Senator Oscar Mauzy Birthday Party 1984 Fund, Anne Mauzy, Treasurer; Senator Oscar Mauzy Birthday Party 1985 Fund, Anne Mauzy, Treasurer; Oscar H. Mauzy State Senator, Dist. 23 Fund, Anne Mauzy, Treasurer; and Oscar H. Mauzy Office Held: State Senator, Office Sought: Justice, the Supreme Court of Texas, Place 1 Fund, Oscar Mauzy, Treasurer.

The case was initiated in the 153rd District Court of Travis County, Texas, cause no. 406,958 where a summary judgment was entered denying all relief sought by petitioner. A related case was brought in Dallas County, Texas, but the Texas Court of Appeals below has held that respondents' attempted transfer of that case to Travis

County is void, a ruling which respondents have not challenged. An appeal of the Travis County judgment was prosecuted to the Texas Court of Appeals for the Third District at Austin, no. 03-93-00084-CV which court denied substantially all relief sought by petitioner and issued an attorney's fee judgment against petitioner. Petitioner applied to the Supreme Court of Texas for writ of error. That court overruled all motions filed by petitioner and denied his application for writ of error.

The case name in the courts below was the same as the case name being used in this Court.[1]

---

[1] Under the ordinary practice where, as here, the Texas Supreme Court denies a writ of error, petitioner's writ of certiorari should be addressed to the Texas Court of Appeals which issued a decision in the case. However, this petitioner complains of the action of the Texas Supreme Court in refusing to grant his motions for disqualification and related motions. It follows that the writ should be addressed to the Texas Supreme Court rather than the Texas Court of Appeals. *Burns v. OH,* 360 US 252 (59); Stern, G & S, *S. CT. PRAC.*, Sec. 6.21 (93 ed.).

If petitioner is mistaken, he prays, in the alternative, that a writ of certiorari be issued to the Texas Court of Appeals for the Fifth District of Texas at Dallas.

TABLE OF CONTENTS

Questions Presented i
Parties viii
Table of Authorities xii
Opinion Below 1
Jurisdiction 2
Court Rules Involved 2
Statement of the Case 7
Reasons for Granting the Writ 14
Summary of Argument 14
The Supreme Court's Most Recent Decisions Demonstrate that the Writ Should Be Granted 15
The *Lavoie* View of Disqualification Cannot Be Squared with the Other Authorities 16
Gibson Supports Petitioner 20
Other Cases Do Not Require Proof of Pecuniary Interest as a Pre-Requisite to Disqualification 22
The Unified Approach of *Liljeberg* Should Be Accepted as the Constitutional Standard 23
In the Alternative, Petitioner Has Met the Test Laid Down by *Tumey* and its Progeny 27
In the Further Alternative, Reversal Is Necessary Because at Least One Member of the Court Was Disqualified 31
Comparative Rectitude Demands Reversal 33
Recap: Disqualification Was Required 34
Decisions in the Wake of *Lavoie* Support Disqualification 35

Conclusion 35

APPENDIX INDEX

Note Re: Opinion of TX S. Ct..... PA1
Opinion TX Ct.App..... PA2
Orders, TX S. Ct. PA39
[Jdgmt] TX Ct. App..... PA40
[Jdgmt] DST CT TavisCo..... PA41
Extracts from Pleadings of Petitioner
Ptr's Motion/Disqualification or Recusal TX S.CT..... PA43
Ptr's Affidavit in Support of Motion for Disqualification or Recusal TX S.CT. PA47
Ptr's Supplemental Affidavit in Support of Motion for Disqualification or Recusal TX S.CT..... PA65
Ptr's Ver. Exhbts. in Support of Motion for Disqualification or Recusal TX S. CT PA85
Ptr's Second Supplemental Affidavit in Support of Motion for Disqualification or Recusal TX S.CT..... PA121
Other Proceedings, News Item, Officials to Correct Reports PA127

TABLE OF AUTHORITIES

Cases:

Alabama Power Co. Ex parte, 196 So2d 702 (AL 67) 22
Aetna v Lavoie, 475 US 813 (86) ..... *passim*
Bakalis v Gomlembeski, 33 F3d 318 (7-IL 94) 35
Berger v US, 255 US 22 (21) 15, 32
Berryhill v Gibson, 331 FS 122 (3 Judge, NDAL 71) 21
Branaum v Patrick, 643 SW2d 745 (SA 82) 7, 8
Brinkerhoff-Faris v Hill, 281 US 673 (30) 2
Burns v OH, 360 US 252 (59) ix
Case v Hoffman, 74 NW 220 (1898) 34
Commonwealth v Continental, 393 US 145 (68) .. 23, 25, 30
Concrete Pipe v Construction, 113 SCT 2264 (93) 35
Dugan v Ohio, 277 US 61 (1928) 18
Duncan v Johnson, 338 So2d 1343 (AL 76) 22
Gibson v Berryhill, 411 US 564 (73) ..... v, 20 22, 25, 30
Howell v Mauzy, ___ SW2d ___, (Aus 94) 1, 39
Howell v Mauzy, 774 SW2d 274 (89) 1
Howell v Mauzy, 495 US 919 (90) 1
Johnson v Sturdivant, 758 SW2d 415 (ARSM 88) 22
Liljeberg v Health Services, 486 US 847 (88) ..... *passim*
Liteky v US , 114 SCT 1147 (94) 35
Mayberry v PA, 400 US 455 (71) 23, 25
Matter of Neely, 364 SE2d 415 (WV 878) 22
Murchison, In re, 349 US 133 (55) ..... i, 18 19, 20, 23, 25, 26
Oakley v Aspinwall, 3 NY 547 (1850) 34
PETA v Berosini, 894 P2d 337 (NV 95) 31

Ragsdale v Progressive, 743 SW2d 338 (Dls.87) (Ragsdale I) 7, 8, 28

Ragsdale v Progressive, 790 SW2d 77 (Dls.90) (Ragsdale II)..... 7, 8, 29

Ragsdale v Progressive, 801 SW2d 880 (TXSM90) (Ragsdale III)..... 7, 8, 29

Taylor v Hayes, 418 US 488 (74).....23, 25, 30

Tumey v OH, 273 US 510 (27)..... *passim*

Tyson v State, 622 NE2d 457 (IN 93)..... 32

Wallace v Howell, 709 SW2d 876 (TXSM 86..... 9

Ward v Monroesville, 409 US 57 (72)..... 20, 25, 27, 35

Statutes and Rules:

US Const. Amdt. 14 ..... *passim*

28 USC Sec. 1257(a) 2, 10

28 USC Sec 455(a) 2

Tx Const, Art. V, Sec. 11..... 11,22

TX Campaign Disclosure Act (CDA) 1985 Elec.C. §251.001-251.019.....*passim*

Texas Rules of Appellate Procedure, R. 15..... 2, 10

Texas Rules of Appellate Procedure, R. 15a(1)&(2)..... 3

Texas Rules of Civil Procedure, R. 18b(1) & (2)..... 4

Articles:

Stein, G & S, S.Ct. Prac., sec. 3.21 (e)..... 2

Stern, G & S, S.Ct. Prac., sec. 6.23 (93 ed.)..... ix

Thode, Reporter's Notes, Code of Judicial Conduct (73) 25

OPINIONS BELOW

In connection with its rulings, of which petitioner here complains, in refusing to disqualify certain of its members (PA 39),[2] in response to timely and specific motions by petitioner (PA 43-47), the Texas Supreme Court issued terse orders only (PA 39)—no opinion or any other explanation, written or oral. The opinion of the Texas Court of Appeals (PA 2-38), published at ___ SW2d ___, is dated prior to the refusal to step down of certain Texas Supreme Court justices whom petitioner asked to step down as disqualified. Thus, the Court of Appeals opinion has no bearing upon the questions now being presented to the Supreme Court. The Court of Appeals opinion does, however, serve to provide factual background and the nature of the claims made.[3]

---

[2] In referring to the proceedings below, petitioner will employ the following abbreviations: (PA)—Petitioner's Appendix attached to this petition and concluded in volume 2 which accompanies this petition; (R)—record of the trial court; (P/TXSCT)—proceedings before the Texas Supreme Court. Unless otherwise indicated, all emphasis has been added.

[3] This is the second time that this particular case has been on certiorari. The Texas Court of Appeals dismissed petitioner's first appeal on technical grounds, *Howell v Mauzy,* 774 SW2d 274(89). The Texas Supreme Court proceeded to overrule a similar, but by no means identical motion for disqualification and denied an application for writ of error (no opinion rendered). Certiorari was denied in 1990. *Howell v Mauzy,* 495 US 919 (90) (Hence, "the 1990 case.") The trial court thereafter held additional proceedings and entered a new judgment from which petitioner has prosecuted the appellate proceedings within.

The within petition presents additional factual detail, argument and authority not included in the 1990 case. Petitioner presents that a clear picture of disqualification is presented on multiple grounds. The Texas courts have now reached a definitive result giving the writ ap-

JURISDICTION

Petitioner complains of judgments and orders of the Texas Supreme Court dated March 30, 1995 (PA 39). overruling petitioner's motion to disqualify and denying petitioner's application for writ of error. *How federal question was presented:* In addressing his motion for disqualification to the Texas Supreme Court, petitioner expressly relied upon "the Due Process Clause of the Fourteenth Amendment to the U. S. Constitution." (PA 43-45). In his motion for rehearing to the said court, petitioner again urged, *inter alia*, that he had been deprived of "Due Process of Law and Equal Protection of the Law guaranteed to petitioner under the Fourteenth Amendment to the United States Constitution" to be heard by a tribunal, fair and impartial, both in appearance and in fact (P/TXSCT M/Reh. filed 14 AP 95, pp. 1-10). Where the constitutional error originates in the state's highest court, the error is sufficiently preserved if addressed in a petition (motion) for rehearing in that court. *Brinkerhoff-Faris v. Hill*, 281 US 673,7-8 (30); Stern, G & S, S. CT. PRAC. §3.21(c). Rehearing was denied on April 27, 1995 (PA 39). Jurisdictional statute: 28 U.S.C. §1257(a)

COURT RULES INVOLVED

Texas Rules of Appellate Procedure:
Rule 15.

(a) Within thirty days after the filing of a proceeding in a court of appeals, the Supreme Court, or the Court of Crimi-

---

plication better focus. The economic or financial benefit claims of petitioner plus the his-own-case propositions are more applicable now that a final decision has been written by the Texas courts. Petitioner urges that in passing upon the writ, the Supreme Court should consider the cumulative effect of all facts and circumstances. Viewed as a totality, a clear case for disqualification has been presented.

nal Appeals, any party may file with the clerk of the court a motion stating grounds why a justice or judge before whom the case is pending should not sit in the case. The court shall allow the filing of a motion after the expiration of thirty days if the motion is grounded upon reasons not known within the thirty day period and upon a showing of good cause.

(b) On the day the motion is filed, copies shall be served on all other parties or their counsel of record, together with notice that movant expects the motion to be presented to the justice or judge ten days after the filing of such motion unless otherwise ordered by the justice or judge. Any other party may file with the clerk of the court an opposing or concurring statement at any time before the motion is decided.

(c) Prior to any further proceeding in the case, the justice or judge shall either recuse himself or certify the matter to the entire court, which will decide the motion by a majority of the justices or judges of the court sitting en banc. A justice or judge who is challenged shall not sit en banc to consider the motion. If a majority of the justices or judges are challenged, the court shall nonetheless decide the motion as to each justice or judge, one at a time, by a majority of the justices or judges sitting en banc except the particular justice or judge being considered each time shall not sit en banc to consider the motion as it directly affects that justice or judge.

(d) To the extent that a motion to recuse is granted, the matter is not reviewable. To the extent that a motion to recuse is denied, the normal appellate review process shall apply.

Rule 15a.

A judge of an appellate court shall disqualify or recuse himself in any proceeding in which judges must disqualify or recuse themselves under Texas Rule of Civil Procedure 18b, or in which he participated in the trial or decision of any issue in the court below.

Texas Rules of Civil Procedure:

Rule 18b.

(1) Disqualification:
Judges shall disqualify themselves in all proceedings in which:

(a) they have served as a lawyer in the matter in controversy, or a lawyer with whom they previously practiced law served during such association as a lawyer concerning the matter; or

(b) they know that, individually or as a fiduciary, they have an interest in the subject matter in controversy; or

(c) either of the parties may be related to them by affinity or consanguinity within the third degree.

2) Recusal

A Judge shall recuse himself in any proceeding in which:

(a) his impartiality might reasonably be questioned;

(b) he has a personal bias or prejudice concerning the subject matter or a party or personal knowledge of disputed evidentiary facts concerning the proceeding.

(c) he or a lawyer with whom he previously practiced law has been a material witness concerning it;

(d) he participated as counsel, adviser or material witness in the matter in controversy, or expressed an opinion concerning the merits of it while acting as an attorney in government service;

(e) he knows that he, individually or as a fiduciary, or

his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(f) he or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person;

(i) is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iii) is to the judge's knowledge likely to be a material witness to the proceeding;

(g) he or his spouse, or a person within the first degree of relationship to either of them, or the spouse of such a person, is acting as a lawyer in the proceeding.

(3) A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.

(4) In this rule:

(a) "proceeding" includes trial, or other stages of litigation;

(b) the degree of relationship is calculated according to the civil law system;

(c) "fiduciary" includes such relationships as executor, administrator, trustee, and guardian;

(d) "financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, or other active participant in the affairs of a party, except that:

(i) ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the fund;

(ii) an office in an educational, religious, charitable, fraternal, or civic organization is not a "financial interest" in securities held by the organization;

(iii) the proprietary interest of a policyholder in a mutual insurance company, of a depositor in a mutual savings association, or a similar proprietary interest, is a "financial interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest;

(iv) ownership of government securities is a "financial interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the securities;

(v) an interest as a taxpayer or utility ratepayer, or any similar interest, is not a "financial interest" unless the outcome of the proceeding could substantially affect the liability of the judge or a person related to him within the third degree more than other judges.

(5) The parties to a proceeding may waive any ground for recusal after it is fully disclosed on the record.

(6) If a judge does not discover that he is recused under subparagraphs 2(e) or 2(f)(iii) until after he has devoted substantial time to the matter, he is not required to recuse himself if he or the person related to him divests himself of the interest that would otherwise require recusal.

STATEMENT OF THE CASE

For the purposes of this petition, the underlying lawsuit was adequately described by the Texas Court of Appeals (PA 3-4). The trial court sustained respondent's motions in full and denied all relief sought by petitioner. (R/"B"442,5,9; "E"22; PA 41). Appeal was taken to the Texas Court of Appeals which substantially affirmed the trial court, the principal exception being that part of the attorney's fee award against petitioner was set aside.[4]

---

[4] Of significance to this petition is the unique background for the intermediate court's ruling on strict-construction-against-the-penalty, (PA28) which ruling petitioner views as the linchpin of that court's entire opinion. On this point, the opinion cited two cases over 50 years old construing unrelated statutes. It also cited a 1982 case from the San Antonio Court of Appeals, which did construe the CDA. *Branaum v Patrick,* 643 SW2d 795 (SA 82).

Before the Austin Court of Appeals, this petitioner relied upon a 1987 decision under the CDA from the Dallas Court of Appeals. *Ragsdale v Progressive,* 743 SW2d 338, 45 (Dis. 87) *(Ragsdale I)* declaring *"Branaum* is not in point." Petitioner also argued as authority *Ragsdale v Progressive,* 790 SW2d 77 (Dis. 90) *(Ragsdale II)* wherein the Dallas Court again rejected strict construction arguments, holding that the CDA was remedial, was for the protection of the electoral process, was a safeguard against fraud, mistake and corruption, and that enforcement of the double damage remedy "is the essence of the statute." HELD: further, the double damages mechanism was designed as the primary method of enforcement of the CDA and was calculated to make the statute self-enforcing by placing the cost of enforcement upon the offender. Petitioner also urged *Ragsdale v Progressive,* 801 SW2d 880,1 (TXSM 90) *(Ragsdale III)* where the Texas Supreme Court Justices declared per curiam, "We affirm . . . regarding the damages issue." (See CTAP, ant.brf.19-22).

The odd or unique element in the opinion of the Austin Court was its complete failure to take notice of the *Ragsdale* authorities, even

Within the thirty-day period provided by TXRAP 15 and before any ruling by the higher court, petitioner filed his motion for disqualification with that court (PA 43-47). It was supported by affidavits (PA 47-65, 65-85, 121-127) and verified exhibits (PA 85-121). Those instruments are extensively abstracted in the appendix; they will be summarized here but briefly.

Beginning in days when, in Texas "Republican" was an epithet, petitioner was a many-time candidate for judicial of-

---

though petitioner expressly argued that *Branaum* has been "overruled or restricted" by the subsequent *Ragsdale* line of cases (ant. at 19).

When petitioner arrived before the Texas Supreme Court, he presented the identical line of argument (P/TXSM. apn.writ err. filed 16 FE95, pp. 18-26). He argued that the within case had been decided on the basis of authority that the Texas Supreme Court had rejected and that the Court should grant argument to clarify the matter. The Texas Supreme Court justices proceeded to overrule petitioner's motion to disqualify and denied writ of error.

The relevancy of the present discussion to this petition for certiorari is that the Texas Supreme Court justices, just as the Alabama Justice in *Aetna v Lavoie,* 475 US 813(86), by denying error, were sanctioning the re-vitalization of the discredited strict-construction-against-the-penalty-rule. Texas now has two irreconcilable lines of authority on the standard of interpretation that applies to the CDA.

Quite obviously, the Texas Supreme Court Justices were providing precedent favorable to themselves. The self-enforcement aspects of the CDA have been ripped asunder. Inasmuch as the Justices are under legal obligation to periodically file CDA reports, they have in effect, provided themselves with insurance against activation of the self-enforcement provisions. In the terms of *Lavoie,* the challenged justices were acting in-his-own-case and were securing for themselves a financial or economic benefit. Coupled with other factors discussed herein, they were disqualified from proceeding.

fice on the Republican ballot. He was finally elected and re-elected as a trial judge; subsequently, he was elected to the Court of Appeals. In 1986, while continuing to hold office on the intermediate court, he was a candidate for the Supreme Court, which was then an all-Democrat bastion.

He attempted to run against Justice Wallace, but as the result of a suit filed by Justice Wallace, petitioner was forced to run against now-Justice Mauzy. *Wallace v. Howell*, 707 SW2d 876 (TXSM 86). Believing that action to be contrary to the Constitution and laws of the United States, petitioner hailed the entire membership of the Texas Supreme Court into federal district court; such case was non-suited when electoral developments made it, pragmatically speaking, moot. The subsequent race against respondent Mauzy produced the within lawsuit and a companion suit against respondent Mauzy and his wife, both containing extensive allegations of violation of the Texas Campaign Disclosure Act (CDA).

Failing election by a small margin in 1986, petitioner began laying plans for another race in 1988; he formally announced for Justice Gonzalez's seat on December 8, 1987. In early January, petitioner became engaged in heated rivalry with the governor's recent appointee to the court, Chief Justice Phillips; at one point, petitioner declared himself a candidate against the Chief Justice, instead of Justice Gonzalez. However, in the final analysis, petitioner became an official candidate against Justice Gonzalez. On January 4, 1995 when petitioner filed the present disqualification motion, five of the seven justices under challenge (the Chief Justice, together with Justice Hecht [1986 and again in 1994], Justice Gonzalez [1988], Justice Gammage [1990] and Justice Enoch [1992]) were past and present political rivals.

As he continued to run for a seat on the state's highest court, petitioner mounted numerous broad based attacks upon the entire membership of the court, for breaches of decorum and for a seeming want of integrity. When the court refused to

accept the highly publicized Texaco-Pennzoil litigation for argument, petitioner contended to the media that "[T]he judges copped out in favor of their pocketbooks" (PA 94-96). As detailed in the appendix, petitioner's political efforts had created a situation where every member of the court had repeated occasion to take umbrage at petitioner's remarks, albeit that those remarks were factually well supported and well within the limits of acceptable campaign tactics.

Among other matters detailed in the appendix, petitioner established that the Chief Justice had personally and financially supported petitioner's 1986 primary election opponent, Justice Hecht (PA 47, 53-55, 69, 93-94). Justice Hecht stood down in the 1990 case, but the Chief Justice refused to do so. 33 TXSCTJ 36 (21 OC 89). During the 1988 campaign, Justice Gonzalez widely denounced petitioner as a "kook." (PA 60-1, 101-2). When petitioner went on television with a sign "Judge Kook" around his neck as a parody of Justice Gonzalez's epithet (PA 60, 100, 101), both the Chief Justice and Justice Gonzalez expressed indignation. The Chief Justice was "shocked" by petitioner and "pleased" to be no part of the campaign of petitioner, a member of his own political party, whereas the Chief Justice was silent concerning the conduct of the opposing party candidate, Justice Gonzalez, in initiating attacks upon the petitioner as a "kook." In addition, all of the justices under challenge save the Chief Justice have arguably committed the same campaign reporting violations as respondent Mauzy (PA 80-5, 122).

In response to petitioner's motion in the 1990 case, Justices Hecht and Mauzy stepped down. 33 TXSCTJ 36 (21 OC 89). In the within 1995 case, neither Justice Hecht nor any of his colleagues sustained petitioner's challenges; they all declined to step down. Petitioner's challenges were rejected without explication and the writ was denied. The Court successively met en banc to determine if any justice should be required to step down. See TXRAP 15. The conclusion: *none of*

the seven was disqualified.[5] Necessarily, any appearance of fairness and impartiality was thin indeed.[6]

Not long prior to the 1990 case, the chief justice certified to the governor his disqualification in another case (PA 118). The grounds: that his former law firm had been retained in the case while the chief justice was still in practice with that firm. There was no indication that the chief justice ever knew that his 200 man firm had even been consulted regarding the case. Nevertheless, he declared to a newspaper that "I had to get out" (PA 120-1). The standardless sweep, the erratic approach that the Texas Supreme Court has adopted with respect to the problem of judicial disqualification is manifest.

In 1990, petitioner's opponent was Justice Gammage, who served in the legislature with respondent Mauzy for a number of the 18 years that respondent was in that body. (PA 58). Justice Gammage concentrated his TV advertising campaign on personal attacks (PA 43, 105-6). Petitioner discovered

---

[5] We further draw attention to petitioner's first and second supplemental affidavits in support of his motion for disqualification, wherein petitioner presented that Justices Spector, Gonzalez, Hecht, Hightower, Gammage, and Enoch had engaged in some of the identical campaign reporting violations that were alleged against respondent Mauzy, to-wit: failure to itemize thousands of dollars in credit card charges, failure to itemize large advances and/or expenditures for travel, entertainment, etc., (PA 80-5, 121-7), the diversion of campaign contributions to personal use ("pocketing" (PA 67) and screening of campaign activities from public view through the mechanism of "Pet PAC's" (PA 68)). Certainly, a judge who has personally engaged in arguably similar campaign reporting violations should be disqualified.

[6] Any contention that the continued service of any justice was a matter of necessity cannot be supported. The Texas Constitution makes provision for the appointment of special justices wherever the court or any member thereof is disqualified. TXCONST art V, §11.

that Justice Gammage had placed his wife on his campaign payroll under her maiden name and made the matter into a major campaign issue, contending that such was a thinly disguised method of circumventing the anti-pocketing statute. Justice Gammage responded that petitioner was dragging his wife into the mud (PA 74-5, 107-10).

In 1992, petitioner's opponent was Justice Enoch. Justice Enoch's disqualifications include the ex cathedra declaration that the case now in bar was a waste of time. "You won't get a thing . . . ever" (PA 76)—a pre-judgment of the merits (PA 75-76). Justice Enoch also conducted a negative TV campaign against petitioner (PA 76, 110). Petitioner thereafter filed a lawsuit against Justice Enoch for CDA reporting violations (PA 111; 114) which case, although non-suited is subject to refiling (PA 76-7) and which the Justice has reason to apprehend may happen, particularly if the strict construction precedent of the within case is overturned. Thus, *Lavoie* is particularly applicable to him.

In 1994, petitioner again opposed Justice Hecht, as he had done in 1986. Justice Hecht's attack TV advertising against petitioner was comparable to the advertising utilized by Justice Enoch (PA 77). In particular, Justice Hecht attacked petitioner with the epithet, "Crazy Charlie" (PA 116) causing petitioner to respond with a complaint to the Judicial Conduct Commission (PA 115-7). Justice Hecht through his manager attacked the complaint as a "stunt . . . either grandstanding or shows his ignorance of the law. . . . " (PA 118).

We anticipate that respondents will attempt to dismiss some of the matters herein cited as "old stuff." Obviously, remoteness is a concern in weighing disqualification claims. However, remoteness has little or no application where differences and disputes are ongoing. None of the matters related herein have existed as long as this lawsuit, filed in the fall of 1986, has existed. Petitioner has been continuously seeking a seat on the Texas Supreme Court since January 1986, almost

ten years ago.

On December 15, 1994, when the instant case was first docketed in the State's highest court, every member of the tribunal was personally aware who petitioner Howell is, had been following his campaign activities for a number of years, and almost surely entertained an opinion of him as a person. Of course, the mere fact that a judge may be acquainted, even well acquainted with a litigant, standing alone, is no disqualification. However, ongoing differences can create a "siege mentality."

Consider Justice Hecht. The exchange of invective and ill-will between petitioner and Justice Hecht in 1986 cannot be dismissed as too remote in view of subsequent events. Is it not fair deduction that the Honorable Justice has entertained a "siege mentality" ever since 1986, particularly considering that, during their repeat engagement of 1994, Justice Hecht publicly attacked petitioner as "Crazy Charlie"?

Consider Chief Justice Phillips. Ongoing differences plus attacks upon his close colleagues, particularly Justice Hecht, to whose campaign the Honorable Chief Justice has contributed cash out of his pocket, answer any remoteness claims. Can any part of the differences between petitioner and the Chief Justice be dismissed as too remote when petitioner continues to seek office as a member of the Court over which the Chief Justice presides? We think not.

The situation differs little with respect to Justices Gonzalez, Gammage, and Enoch. Petitioner's continued electoral efforts casts petitioner as an adversary, insofar as each of them is concerned. "Next election, he may run against me." As long as they remain in this frame of mind, they are unlikely ever to dismiss or forget past differences. Remoteness is not an issue in this case.

REASONS FOR GRANTING THE WRIT

Summary of Argument:

(1) The constitutional tests for measuring judicial disqualification have been extended and interpreted beyond recognition. It is time for the Supreme Court to cease talking in terms of disqualification for bias and prejudice, in terms of *direct* pecuniary interest and the like. Through repeated interpretation, such concepts have become unrecognizable and unworkable.

Over sixty years ago, Chief Justice Taft and a unanimous court formulated a due process test for disqualification, quoted many times since, by inquiring if the circumstances were such as to offer a temptation not to hold the balance nice, clear and true. It is time to adopt such true-balance test as the single unified test of due process disqualification. Inquiries as to the judge's statements and attitude, as to possible economic benefit, or to his relationship to the case as complainant, witness, prosecutor, etc., along with any other factors that might motivate him not to follow the law and the evidence, should be viewed as sub-tests or merely evidence to be weighed in connection with the true-balance test and not as independent tests of disqualification.

(2) As a lesser alternative, the Court should adopt the views of the three separately concurring justices in *Aetna v. Lavoie*, 475 US 813 (86), that the disqualification of a single member of a multi-member tribunal infects the entire decision. There is ample evidence of "direct pecuniary interest," as expansively defined in *Lavoie* on the part of at least one or more Texas justices requiring reversal.

(3) As a further alternative, petitioner urges that an appellate court be viewed as a unit and that comparative rectitude be applied. Petitioner is able to meet either test handily.

The Supreme Court's Most Recent Decisions Demonstrate that the Writ Should be Granted:

During recent years, this Court has issued two pioneering decisions:

(1) *Aetna v. Lavoie*, 475 US 813 (86) (justice of Alabama Supreme Court disqualified—the case before him could establish precedent valuable to him in his unrelated personal lawsuit), was the first time that the United States Supreme Court ever passed on a claim of appellate disqualification.

(2) *Liljeberg v. Health Services*, 486 US 847 (88) (federal district court judge was college trustee, his ruling in case could enhance value of college land; HELD disqualified even though college not a party and judge not aware of college's tangential benefit), was the first instance since 1921 where the Supreme Court held a federal judge disqualified. *See Berger v. US*, 255 US 22 (21).

Both cases present problems of interpretation. When interpreted in light of the interest in safeguarding a fair and impartial tribunal, they demonstrate error in the action of the court below.

The Problems with *Lavoie:* (1) The narrow view that the majority took of the 14th Amendment right to a fair and impartial tribunal; (2) The declaration intimating that it is still an open question whether the amendment extends to state courts unless a "pecuniary" interest is involved; (3) The proper definition of "direct . . . [and] pecuniary" interest; (4) The definition of "his own case"; and (5) Whether the Court should adopt the three-judge concurrence urging that the disqualification of one member of a multi-member tribunal infects the decision of the entire court. If so, the petitioner's burden is much lightened.

The major problem with *Liljeberg:* Is the decision of constitutional proportion? If so, does it not cast doubt upon

the restrictive language of *Lavoie?*

The *Lavoie* View of Disqualification Cannot be Squared with Other Authorities:

Petitioner applauds *Lavoie*'s result. He questions the opinion's unnecessary language. Part III-A opines that the ABA Code provision, calling for disqualification for bias or prejudice "would not be sufficient basis" to trigger due process disqualification. It then states that the Due Process Clause only protects fundamental rights. OF COURSE!! It is axiomatic that the Constitution only sets the outer limits within which government must operate. The right to a fair and impartial tribunal has long been recognized as fundamental; the debate continues with respect to those situations which traverse that right. The opinion then qualifies the statement just quoted by declaring that "we need not decide" if bias would ever be a sufficient due process challenge and then further qualifies itself by stating t. at "certainly" only extreme cases of bias would offend due process. Plainly, everything in part III-A was pure dicta.

The only stated basis for such dicta was authority over 40 years old. The more modern authorities are discussed below. Even so, such dicta might be accurate if limited to *Berger*-type situations based upon a judicial display of actual animus. Decisions since *Berger* have uniformly held to strict standards and the vast majority have failed.

The principal shortcoming in the entire *Lavoie* opinion is the attempt to pigeon-hole every case as either a display of animus challenge or as a challenge for "direct pecuniary interest." Not so!! Uncounted situations severely question a judge's impartiality without any display of animus, without his pocketbook ever having been involved. *Liljeberg* brings into focus such third category. Petitioner's challenges to certain of the Texas judges might be so classified. *Lavoie* did not declare this third category beyond due process protection; *Lavoie* simply failed to take notice of the existence of a third category.

In Part III-B, *Lavoie* found disqualification on the grounds that the challenged justice " 'acted as a judge in his own case,' " and also that his interest was " 'direct . . . [and] pecuniary.' " The major problem with the first test is the nebular nature thereof; the second test has been tortured beyond recognition.

Tumey v. OH, 273 US 510 (27) (disqualifying village mayor compensated as judge of petty offense court by award of costs only if conviction occurred) was the seminal case on constitutional disqualification. HELD the Fourteenth Amendment is offended if the judge has a "direct, personal, substantial, pecuniary interest" *Id.* 523, in the outcome of the case. In *Tumey*, the pecuniary interest was crystal clear. If convicted, the defendant paid $12 costs and the judge-mayor put the money in his pocket. NOT SO in *Lavoie* which involved at most a ripple-effect economic gain from the case wherein the disqualification challenge was leveled. Obviously, ripples can be as powerful as a tidal wave. The point, however, is that *Lavoie* has carried the pecuniary interest test beyond the concept of who gets the money adjudged in the case where the disqualification challenge is lodged. Petitioner suggests that we do not need another test for constitutional disqualification. The "true-balance" test, to be discussed momentarily, covers all situations. Tests concerning display of animus, possible economic benefit tot he judge, his identification as a witness, complainant or prosecutor, etc., need to be renounced as independent tests; they can be adequately addressed as factors weighing upon the true-balance test.

Tumey did not conclude with the pecuniary interest ruling quoted above. It went on to establish the often quoted true-balance test.[1] The court noted that the mayor had an ad-

---

[1] "Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance

ministrative duty to raise revenues, creating the specter of "a motive to help his village by conviction and a heavy fine." *Id.* 533.[2] Clearly, *Tumey* found not one but two grounds for disqualification, (1) pecuniary interest and (2) temptation-not-to-hold-a-true-balance based on the duty to raise revenues.[3] Obviously, the collateral benefit or ripple benefit shown in *Lavoie* would, under *Tumey*, only fit into the second or "true balance" category. By failing to make this distinction, *Lavoie* has inevitably injected confusion into judicial disqualification.

Tumey was the leading authority until *In re Murchison*, 349 US 133 (55) (under Michigan law, judge functioned as one-man grand jury hearing witnesses in secret; HELD grand jury-judge disqualified to hear contempt case arising during grand jury hearings).[4] Since *Murchison*, few disqualification

---

nice, clear and true between the state and the accused denies the latter due process of law." *Tumey*, 273US at 532.

[2]"[T]he disqualification of the judge . . . existed *both* because of his direct pecuniary interest in the outcome, *and* because of his official motive to convict and to graduate the fine to help the financial needs of the village. *There were thus presented at the outset both features of the disqualification.*" *Id.* at 535.

[3]The fact that *Tumey* established two grounds of disqualification is confirmed by *Dugan v. Ohio*, 277 US 61 (1928). There, the Court upheld a conviction imposed by the Mayor of Xenia, Ohio. Chief Justice Taft thought it necessary to emphasize *both* that "[t]he mayor of Xenia receives a salary which is not dependent on whether he convicts in any cases or not," 277 US at 65, and that "[t]he mayor has no executive, and exercises only judicial functions." 277 US at 63. The negation of both aspects of *Tumey* suggests that either would have been sufficient.

[4]"A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of

cases *(Lavoie* being no exception) have failed to cite or quote this leading authority.

We submit: (1) Murchison's principal authority was *Tumey;* (2) *Tumey* was considered controlling even without hint of pecuniary interest in the *Murchison* judge; (3) Instead *Murchison* went off on *Tumey*'s second ground, the true-balance test; and (4) any contention that constitutional grounds for disqualification were limited to judicial-display-of-animus or pecuniary interest was refuted; constitutional disqualification extends to "every" situation traversing the true-balance test.

Lavoie cited *Murchison* for its his-own-case ruling. *Id.* '586. Even in *Murchison,* his-own-case was more metaphoric than real. No matter how much the complaining witness and the prosecutor may refer to a criminal prosecution as "my

---

cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. Circumstances and relationships must be considered. This Court has said, however that "every procedure which would offer a possible temptation to the average man as a judge . . . not to hold the balance nice, clear and true between the State and the accused denies the latter due process of law" [citing *Tumey].* . . . Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way "justice must satisfy the appearance of justice." . . .

. . . A single "judge-grand jury" is even more a part of the accusatory process than an ordinary lay grand juror. Having been a part of that process a judge cannot be, in the very nature of things, wholly disinterested in the conviction or acquittal of the accused. . . . Fair trials are too important a part of free society to let the prosecuting judges be trial judges of the charges they prefer. *Murchison,* 349 US at 133.

case," the only proper party to a prosecution is the governing authority. *Murchison* was on sound ground in invoking true-balance and appearance-of-justice, but it was weak on "his own case."

Lavoie illustrates the superfluity of "his own case." The only basis suggested is that the challenged judge stood to reap a "direct" benefit. From the identical facts, *Lavoie* has found two distinct grounds for disqualification, the two theories being, on logic, indistinguishable one from the other. We suggest that *Lavoie* has issued two claim checks for the same hat, two tickets for one bag of laundry.

The clarity of *Murchison* would have been enhanced if it were limited to the true-balance test, the statement of his-own-case as a separate test for judicial disqualification adding little but confusion. What, we ask, did his-own-case add to *Lavoie* beyond inscrutability? How much better it would have been to apply the true-balance test and omit direct (but collateral, ripple-effect) pecuniary interest and his-own-case-because-he-stood-to-realize-a-large-but-nonetheless-tangential-gain. The Supreme Court will much clarify the law when it adopts true balance as the overriding measure of constitutional disqualification, holding his-own-case and pecuniary benefit only to be factors therein.[5]

Gibson Supports Petitioner:

Gibson v. Berryhill, 411 US 564 (73), is factually close to petitioner Howell's case. The district court had found the

---

[5] The Ohio mayor's courts were revisited in *Ward v. Monroeville*, 409 US 57 (72). Inasmuch as the Monroeville mayor was paid a salary, the Supreme Court agreed that the pecuniary interest test was inapplicable, but it nevertheless held the true-balance test to apply. HELD, Inasmuch as the mayor was charged with the duty of raising revenues, he was disqualified to try traffic cases.

board disqualified for bias, and had further found disqualification for financial interest. *See Berryhill v. Gibson*, 331 FS 122,5-6 (3-Judge, NDAL, 71). According to the Supreme Court's analysis, the district court framed the inquiry not in terms of actual bias but whether there is a possible temptation to try the case with bias for or against any issue presented." 411 US at 571. In short, *the basic issue was equated with the historic true-balance test.* Financial interest was found in the fact that if the optical goods company were forced to discontinue prescribing lenses, the private practitioner optometrists would fall heir to additional business. Thus, the Supreme Court found "a serious question of a personal financial stake in the matter in controversy was raised." *Id.* 571.[6]

The situation differs but little from the case at bar. Clearly, the members of the Texas Supreme Court harbored bias when that term is defined in accordance with the true-balance test. There has been much litigation between petitioner and the court's members. Much campaign rhetoric has been directed against virtually the entire membership of the court. Those members are also petitioner's political competitors. They strive for the same office. The rise of the minority party threatens the positions of the majority. Their jobs are at stake; all members have their pocketbooks on the line with respect to the expense of future elections and the possibility of being de-

---

6."The District Court apparently considered either source of possible bias—prejudgment of the facts or personal interest—sufficient to disqualify the members of the Board. Arguably, the District Court was right on both scores, but we need reach, and we affirm, only the latter ground of possible interest.

"It is sufficiently clear from our cases that those with substantial pecuniary interest in legal proceedings should not adjudicate those disputes [citing *Tumey)* . . . And *Ward* . . . indicates that the financial stake need not be as direct or positive as it appeared to be in *Tumey." Id.* 579-80.

feated for re-election. *Gibson* demands the disqualification of the Texas court.

The entire membership of the Alabama Supreme Court withdrew from the case when a fellow justice was the plaintiff in his own personal injury suit arising out of the justice's untimely collision with a utility pole. *Ex parte Alabama Power Co.*, 196 So2d 702,3 (AL 67). The entire membership of the court also removed itself from the case of *Duncan v. Johnson*, 338 So2d 1343,4n (AL 76). *In Matter of Neely*, 364 SE2d 250 (WV 87), the West Virginia Supreme Court disqualified when it was called upon to consider misconduct allegations concerning one of its members. In *Johnson v. Sturdivant*, 758 SW2d 415 (ARSM 88), the Supreme Court of Arkansas disqualified when one of its members was found to be in litigation with the insurance carrier before the court wherein the disqualification challenge was lodged. Plainly the Supreme Court of Texas is out of step with the national consensus respecting judicial disqualification.

Situations calling for a member of the state's highest court to disqualify are rare. However, questions of disqualification of appellate court judges and justices are especially important because of precept; the justices set an example for all lower court judges. The Texas justices were obligated to do what the Alabama, West Virginia and Arkansas judges did— withdraw in favor of special justices appointed under TXCONST art. V §11. They failed to obey the command of the 14th Amendment and the United States Supreme Court must order them to do so.

Other Cases Do Not Require Proof of Pecuniary Interest as a Pre-Requisite to Disqualification.

Lavoie can be read as suggesting that the Constitution will not relieve judicial disqualification unless the challenged judge has some direct (but as expansively re-defined) pecuniary interest in the case. Any such reading is unjustified. *Tumey*

does not so hold. *Murchison* is clearly to the contrary. Other cases have found disqualification without a showing of financial interest, certainly not the type described in *Tumey.*

In *Commonwealth v. Continental,* 393 US 145 (68) (arbitrator retroactively held disqualified for failure to disclose extensive consulting services rendered in the past to a party), there was no showing that the challenged judge (arbitrator) had any present or prospective pecuniary interest, direct or indirect, *in the judgment,* the only financial tie to the party being past dealings. The consultant had rendered no services for more than a year. The disqualifying factor was the failure to make affirmative disclosure of facts that would have assisted the offended party to challenge him, the judge-arbitrator, a situation comparable to that of a venireman suppressing information at voir dire. Nevertheless, the disqualification was held to be "a *constitutional* principle." *Id.* 148. Tribunals "not only must be unbiased but also must avoid even the appearance of bias." *Id.* 150.

In *Taylor v. Hayes,* 418 US 488,500-1 (74) (trial judge disqualified to try lawyer for contempt occurring during lengthy criminal trial), the court ruled on the *Tumey* "true-balance" test and on *Murchison.* HELD: even the "appearance" of a bias is disqualifying. *Accord: Mayberry v. PA,* 400 US 455,64-6 (71) (self-representing criminal defendant held in contempt for verbal attacks on judge during trial; vilified judge disqualified), the controlling authority *Murchison.*

Clearly the pecuniary interest test of *Tumey,* if it was ever a constitutional limitation upon judicial disqualification, is no longer the law of the land. *Lavoie,* if it intended to so hold, erred.

The Unified Approach of *Liljeberg* Should Be Adopted as the Constitutional Standard:

In 1927, a unanimous Court stated that many matters of

judicial disqualification should be left to legislative discretion and that all questions of disqualification do not "involve constitutional validity." *Tumey*, 273 US at 523. Petitioner admits that *Lavoie* neither added to nor subtracted from that holding. The Court further held that questions involving pecuniary interest and the true-balance test d*o involve constitutional validity*. Similarly, it has numerously been held that not all judicial errors are of constitutional proportion; only when they seriously impinge upon protected rights do they fulfill this test.

Beyond argument, a fair and impartial tribunal *is* a protected right; the only legitimate debate is the nature and extent of the protection. Our principal theme: The proper constitutional protection would best be afforded by a unified standard. The latest opinion in point is an example of the unified standard. *Liljeberg v. Health Services*, 108 SCT at 2194.

Of course, that case involved a federal statute, 28 USC §455 (74 amdt) but the statute in turn tracks the constitutional standard. In framing §455, Congress broadly commanded disqualification wherever the judge's "impartiality might reasonably be questioned," *Id.* §455(a), and thereafter appended more specific provisions. We submit: The statute tracks *Tumey*, which declared a broad constitutional principle and left the legislative bodies free to specifically address the principal evils, as perceived.

What difference between a declaration that a judge is disqualified by "[e]very procedure . . . which might lead him not to hold the balance nice, clear and true," *id.* at 532, and a command that a judge "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned?" 28 USC §455(a). *The tests are one and the same.* We cannot envision where the one provision might disqualify and the other *not* do so.

At the same time, neither statement is more than *a broad statement of constitutional principle*, comparable to the

Fourteenth Amendment. The term, "Due Process of Law," was coined 100 years ago; its interpretation ha only begun. Likewise, interpretation of true-balance and impartiality-subject-to-question will span generations. Today's task is to lay a firm foundation so that decisions under the one standard may be related to the other.

During the two decades before the Congress enacted impartiality-subject-to-question, the Supreme Court rendered *not one decision* examining the disqualification of federal judges. During that period, it did render *Murchison* (1955), *Commonwealth* (1968), *Mayberry* (1971), *Ward* (1972), *Gibson* (1973), and *Taylor* (1974), each dealing only with *constitutional disqualification.* Clearly, Congress was concerned with establishing a test consonant with those decisions.

Commonwealth, 393 US at 160, states that a tribunal " . . . not only must be unbiased but must also avoid appearance of bias." As pointed out in *Liljeberg* at n.7, §455(a) was patterned after the ABA Code of Judicial Conduct. Professor Thode, the reporter for the drafting committee, states that the intent of Canon 3(C)(1), incorporated into §455(a), was to codify the appearance-of-justice test as described in *Commonwealth, supra.* Thode, REPORTER'S NOTES, CODE OF JUDICIAL CONDUCT, 60 (73). We also note a concern with the "appearance of justice. 108 SCT at 1587 (citing *Murchison).* It again follows that §455(a) is a statutory restatement of constitutional principle.

We emphasize: §455(a) is *a unified principle of constitutional law. Liljeberg* did not concern itself with abstruse and attenuated tests of direct-pecuniary-interest or his-own-case or bias-for-failure-to-maintain-true-balance. Inasmuch as §455(a) is encumbered with no such baggage, it was possible for this Court and the courts below to go to the heart of the matter to look at the complete facts, to weigh the relationships and the timing of the incident, and to speak to the matter both directly and in plain English. The Supreme Court needs to go further

and hold that the tests labored in *Lavoie* and its predecessors have developed an arcane gloss upon *Tumey*'s ultimate test, *i.e.*, the true balance test.

Thusly viewed, *Liljeberg* is direct authority for the reversal of this petitioner's case. Simply stated, neither the Texas Supreme Court nor its members can satisfy the appearance of justice with respect to petitioner Howell. We grant that the difference in political stripes, standing alone, would hardly constitute a complaint of constitutional proportion. However, you must add the fact that the defendant has recently served as an incumbent member of that court, plus the fact that petitioner has engaged in recent election contests with other members of the court, plus the facts concerning the extensive exchange of rivalry and invective. Bear in mind that Justices Gonzalez, Hecht and Enoch have all been involved in litigation with this petitioner. To this mix, add the fact that six of the seven justices under challenge have seemingly engaged in campaign reporting practices which petitioner, by this case, seeks to condemn.

Does this mix not present a compelling case for disqualification? Has the true balance not become tilted? Is the appearance of justice not absent? Has the impartiality of the honorable members of that court not become subject to question? Petitioner submits the affirmative. As stated in *Liljeberg*, a principal objective of judicial disqualification is "to promote public confidence in the integrity of the judicial process." *Id.* at 2202.[7] Clearly, the balance had fallen askew when petitioner

---

[7] The Court further stated:

> we must continually bear in mind that " 'justice must satisfy the appearance of justice' " [citing *Murchison*].
>
> . . . .
>
> [P]eople are often all too willing to indulge in suspicions and doubts concerning the integrity of judges. . . . [C]onfidence in the judiciary [is to be promoted] by avoiding even the ap-

moved for disqualification. The members of the Texas Supreme Court were obligated to withdraw and the United States Supreme Court must now order them to do so.

In the Alternative, Petitioner Has Met the Test Laid Down by *Tumey* and Its Progeny:

To this point, petitioner has urged that the law should be clarified by renouncing tests that create more confusion than enlightenment. However, petitioner does not, by any means, concede that he cannot meet those tests. To the contrary, he has met them all.

Direct pecuniary interest: *Lavoie* makes it clear that a collateral, ripple effect, tangential economic benefit, is nonetheless to be classified as a direct pecuniary benefit, so long as it is substantial; it may not be speculative.[8] Petitioner suggests on strength of *Lavoie* that the test of financial or economic disqualification is best stated in the converse as follows: Any significant economic benefit, either actual or potential[9] which

---

pearance of impropriety whenever possible.

Id. at 2204-5. In this connection, *Liljeberg* cites *Lavoie* and states "[T]his concern has constitutional dimensions." *Id.* at 2205 n.12. In support of the statement, the Court quotes *Lavoie*'s discussion of *Tumey, Murchison* and *Ward*, all of which reinforces the proposition stated above, that §455(a) is but a legislative re-statement of constitutional principles.

[8] In *Lavoie,* this court found that the possibility of inclusion in a class action of all the justices therein challenged should not be characterized as "direct, personal, substantial, and pecuniary." Instead the interest was declared "highly speculative and contingent." 475 US at 814.

[9] Bear in mind that any economic benefit for the Alabama justice who

is neither "highly speculative [n]or contingent is disqualifying." Considering that all of the challenged Texas justices are required to file CDA reports routinely and that the double damages provisions are couched in no-fault terms, the justices have all insulated their pocketbooks from liability for matters of oversight, a not insubstantial consideration (see PA 127-8). Their interest in re-vitalizing the strict-construction against-the-penalty rule was not insubstantial, it was not speculative nor contingent; it was disqualifying.

Liljeberg likewise found a collateral interest to be disqualifying. The challenged judge-university trustee refused to disqualify stating: "Loyola University was not and is not a party to this litigation, nor was any of its real estate the subject matter of this controversy." *Id.* 2206 n.15. Nevertheless, the promised enhancement in value of university land was sufficient to disqualify. *Id.* n.15. *Potential collateral economic rewards to the judge or those identified with him can disqualify.*

The direct (as defined) pecuniary benefit to the Texas justices was the elimination of competition for office, the safeguarding of their employment. Petitioner having been five times a candidate for the court, the prospect of future opposition was substantial and the insulation of themselves from CDA double damage liability—when taken in combination, a tasty morsel.

The six justices whose campaign finance reports were subject to the same evils as alleged against respondent Mauzy (PA 67-8, 80-5, 121-7) have a patent economic (pecuniary) interest in the defeat of the instant lawsuit; they are exposed to the prospect of injunction, to penalties of the State of Texas, to

---

was found disqualified, was potential. First, he had to establish the favorable legal precedent; but, he would receive nothing for doing so unless the precedent was thereafter applied in his wholly unrelated case.

statutory double damages to their former political opponents and to attorney's fee awards.

His-own-case: Most certainly, the six justices whose campaign finance reports suffered from the same deficiencies as alleged against respondent Mauzy had an axe to grind. By "acquitting" Justice Mauzy of improper reporting practices, they are insulating themselves from complaints regarding their own reports. By "acquitting" respondent, they are acquitting themselves—the precise situation precipitating his-own-case rulings in *Lavoie* and *Murchison.*

Lavoie and his-own case doctrine are specifically applicable to all of the challenged justices because the intermediate court below rejected, *sub-silentio* the authority of *Ragsdale I, II, & III,* declaring the CDA remedial and calling for full enforcement of the double damages mechanism. Instead, the Austin Court of Appeals chose to favor the older strict-construction-against-the-penalty authority.

Even though the justices of the State Supreme Court had "affirmed" *Ragsdale II,* they chose not to intervene in the conflict of decisions posed by the instant *Howell v. Mauzy* opinion. By doing so, the Honorable Justices were, each of them, erecting a barrier to personal liability to injunction, double damages, and attorney's fees. His-own-case is applicable. Alternatively, the justices are disqualified on the grounds of financial or economic interest.

Again, petitioner submits the foregoing to apply particularly to the Honorable Justice Enoch, who is presently subject to the renewal of a CDA action against him for using state employees and facilities in his campaign against this petitioner. His-own-case further applies to all justices under challenge because petitioner is a probable contender for one of their positions. The adverse precedent generated by petitioner's loss of

this case protects their jobs.[10]

Appearance of Bias: *Gibson* held that a disqualifying bias exists wherever there is an apparent temptation to try the case with bias for or against any issue. *Id.* 571. A similar holding is to be found in *Commonwealth.* The Supreme Court declined to expressly approve *Gibson* on this ground, but it spoke favorably. *Commonwealth* and the three judge district court in *Gibson*, 331 FS at 125-6, support application of the appearance of bias test to petitioner's case. The political differences, the rivalries, the repeated campaigns for election to the court, the lawsuits, both past and pending—when added together, they produce a substantial, even an extreme showing of appearance-of-bias, the converse of appearance-of-justice. We emphasize that *appearance* is the deciding factor. The record clearly re-

---

[10]For an office holder, and particularly for a judge, to be held to have filed a meritless lawsuit against a political opponent has implications far beyond the economic loss incurred. Postulating that petitioner will suffer adverse publicity from defeat in this lawsuit and that petitioner is a potential political opponent for all under challenge, it follows that all seven have an his-own-case interest in the defeat of petitioner's lawsuit; they are disqualified.

What a great campaign issue, for every future election where petitioner might appear on the ballot. "He files groundless lawsuits against his opponents." Again, take note that petitioner has an ingrained habit of running for judicial office every two years. He gained election to a trial court and has risen to an intermediate court, only the State Supreme Court remains. Every justice interested in retaining his seat and in being free from burdensome re-election campaigns has reason to desire that petitioner be "convicted" of filing a groundless lawsuit. Even those of his own political affiliation are subject to primary election challenges (PA 47,9-57; 65-70-2,5-8). They are in the same position as the vilified judge in *Taylor.* Similar to *Lavoie,* each justice has a reason to desire that the negative precedent be upheld. It follows that each justice was presiding in "his own case."

flects the temptation not to hold the balance straight and true; disqualification for appearance-of-bias has been shown.[11]

In Further Alternative, Reversal Is Necessary Because at Least One Member of the Court Was Disqualified:

In *Lavoie*, Mr. Justice Brennan wrote a concurrence stating that the participation of the sole disqualified justice "was sufficient in itself to impugn the decision." *Lavoie*, 106 SCT at 590 (conc.op.). Mr. Justice Blackmun, joined by Mr. Justice Marshall, also concurred that the "mere participation" by the disqualified justice "posed an unacceptable danger of subtly distorting the decision making process." *Lavoie*, 475 US 834 (conc.op.). The majority declined to reach the question whether the disqualification would require reversal where the challenged vote is "mere surplusage."

The *Lavoie* concurrence was elevated into a rule of decision in *PETA v. Berosini*, 894 P2d 337, 41-2 (NV 95) (Disqualification of one judge of unanimous appellate panel cannot be treated as surplusage; decision must be vacated and case resubmitted.)[12] Nothing less will purge the decision below from

---

[11] **The Same Argument Supports the Companion Tests:** A principal theme herein presented is that the various tests for disqualification have been expanded to the point of overlap; their separate identity has been lost. We argue the tests separately, in case the Court does not agree. However, our arguments under the three tests necessarily overlap. To avoid repetition, we invoke all arguments under this topic in support of each test urged herein.

[12] "We conclude that the role that collegiality plays in appellate decisions mandates full reconsideration of this matter.... [citing *Lavoie* concurrences] Further, it would be inconsistent with the goals of... [the ABA Standards of Judicial Conduct as adopted in Nevada] to require certain standards of behavior ... but then to allow a judge's ruling to stand when those standards have been violated.."

the taint of disqualification.

Justice Gonzalez Was Clearly Disqualified—One of petitioner's strongest cases for disqualification runs against Justice Gonzalez. In 1988, petitioner was locked in raucous combat over Justice Gonzalez's judicial position. The Honorable Justice was marching all over the state denouncing petitioner as a "kook." Petitioner's response, in part, was a complaint to the Judicial Conduct Commission accusing Justice Gonzalez of unlawful campaign practices. When he learned that he was winning, Justice Gonzalez proclaimed, "Given the opposition, I would've expected to have done better." (PA 103). When the Commission ruled in his favor, Justice Gonzalez caustically declared, "It's unfortunate that we have people like Charles Ben Howell who don't know when to quit." (PA 104-5). Additionally, Justice Gonzalez is one of the justices whose campaign disclosures suffer from identical infractions that are under attack in this very case. (PA 80-5,122)

Economic disqualification has been thoroughly discussed, along with other tests. Justice Gonzalez was disqualified under any test, even the display-of-animus test first enunciated in *Berger*, 255 US at 22, and the "extreme circumstances" test surmised about in *Lavoie.*

Chief Justice Phillips Was Clearly Disqualified—Peti-

See also, *Tyson v State,* 622 NE2d 457,60 (IN93). "Substantial concerns about fairness arise when a judge [of an appellate panel] who arguably should disqualify remains as a voting participant. Failure to recuse under some circumstances would deny a party due process of law [citing *Lavoie].* Moreover, a judge who sits on a case notwithstanding legitimate grounds for recusal can damage public confidence. . . . " Petitioner suggests that where his colleagues decline to require a disqualified justice to step down, the damage to public confidence extends to the entire court.

tioner was a rival candidate, although briefly, for the Chief Justice's seat in the 1988 Republican primary. In 1986, the petitioner defeated, in the Republican primary, Chief Justice Phillips' friend and confidant Justice Hecht, for whom the Chief Justice had supported, worked, and contributed. During the 1988 campaign, the Chief Justice went out of his way to disassociate himself from petitioner finally declaring that he was no part of petitioner's campaign, "This is a good example of why I'm please that I'm just running my own race." (PA 19, 47, 53-55, 69, 93-94, 60-1, 101-2).

Comparative Rectitude Demands Reversal:

If the Court is not prepared to accept the *Lavoie* concurrence in full, it should weigh the totality of the circumstances. The *Lavoie* majority intimates a willingness to adopt such an approach. *Id.* 1588 n.4. The overriding reason to grant relief, even if only one, two, or three members of the appellate court be held disqualified, is the Caesar's wife test. In petitioner Howell's case, none of the seven Texas Supreme Court members under challenge can be held completely above reproach. The marginal qualifications of certain justices, taken in combination with one or more clear disqualifications, creates a tribunal from which petitioner should have relief. An appellate court is but a single unit. No member has the power to decide any case except by participation in a majority vote. Another possible method of weighing the effect of disqualification is to test the court as a unit, an entity. In the case *sub judice*, it is plain that the rectitude of those members against whom the Supreme Court may fail to sustain a challenge, was insufficient to cure the unconstitutional act of the court, in allowing those who were clearly disqualified, to sit. Any lesser ruling will insulate the Texas Supreme Court, and every other multi-member court, from constitutional challenge, for the most egregious reasons, against anything less than a majority of the court's

members.[13]

Recap: Disqualification Was Required.

Beginning with *Tumey*, the United States Supreme Court has, from time to time, recognized multiple tests for the constitutional disqualification of judges: (1) the true-balance test; (2) the pecuniary interest test; (3) the his-own-case test; (4) the appearance-of-bias test (some may consider the absence of an appearance of bias as a separate test, petitioner views it as merely the converse of appearance-of-bias); and (5) possibly, actual bias (display of judicial animus, *Lavoie* hazards its possible application in "most extreme" cases; *id.* 1585). The separate tests have been extended by construction to the point where they hopelessly overlap. The true-balance test should be recognized as the only test. The remaining "tests" should be recognized as special circumstances weighing upon the primary test.

---

[13] There is a paucity of authority concerning appellate courts, but the better view is that if a single disqualified justice participates in the deliberations, the entire case is fatally infected. *Case v. Hoffman*, 74 NW 220 (1898); *Oakley v. Aspinwall*, 3 NY 547 (1850). Most of the cases indicating a contrary view are distinguishable.

Most of the disqualifications in authorities not following *Case-Oakley* would classify according to *Tumey*, as being within "legislative discretion." *Id.* 523. Insofar as the states are free to create legislative disqualification, they are free to decide the consequences of that disqualification. Here, we urge constitutional disqualification, a more serious matter than legislative disqualification. Witness that the *Lavoie* disqualification was first raised in a tardy motion for rehearing. Witness that the *Liljeberg* disqualification was not raised until after an appeal was complete. The Supreme Court's willingness to consider late-blooming claims constitutes a profound judgment on the seriousness of constitutional disqualification.

Decisions in the Wake of *Lavoie* Support Disqualification:

Petitioner's lead authority is, obviously, *Lavoie.* Since *Lavoie,* the Supreme Court has not addressed the disqualification of state judges. It has, however, again addressed the disqualification of federal judges. As presented herein, due process considerations underlie the federal statute involved, providing considerable basis for comparison of cases addressing the disqualification of federal judges.

Liteky v US, 114 SCT 1147 (94) involved the extrajudicial source rule. None of petitioner's claims relating to statements and demeanor of the challenged justices can be attributed to "an 'intradjudicial' " source, the *Liteky* fact situation is not comparable. We do note however, that *Liteky* held that the extra-judicial source rule was, in reality, an extra-judicial factor. The holding is in line with the proposition, made herein, that pecuniary-interest, his-own-case, trial-by-competitors, etc. are but factors to be considered in applying the true balance test.

Concrete Pipe v Construction, 113 SCT 2264(93), was an administrative law case inquiring how much finality may be accorded to a decision maker, who under the statutory scheme could not be neutral. Although far on its facts, *Concrete Pipe* re-affirmed the validity of *Tumey* and *Ward.* See also, *Bakalis v. Colembeski,* 35 F3d 318(7-1194) holding that a running controversy would disqualify the decision maker. Petitioner submits that he was involved in running controversy with several of the challenged justices, which caused disqualification.

Conclusion: For each reason given in support of the questions presented, a writ of certiorari should issue.

Respectfully submitted,

PETER I. BARGMANN
Counsel of Record for Petitioner

No. _____

IN THE
Supreme Court of the United States
October Term, 1995

CHARLES BEN HOWELL, *Petitioner*
v
OSCAR MAUZY, ET AL., *Respondents.*

PETITIONER'S APPENDIX

THE SUPREME COURT OF TEXAS; Charles Ben Howell v Oscar Mauzy, et al.; 94-1,293; March 30, 1995

[Notation re: Opinion of the
Texas Supreme Court]

[Note: By this petition for certiorari, petitioner complains of the refusal of the Texas Supreme Court to require any of its justices to disqualify in response to petitioner's motions challenging their impartiality. The Court delivered no opinion or other explanation, written or oral, concerning its refusal to do so. The relevant orders of the Texas Supreme Court are reproduced in this appendix, *infra.*]

COURT OF APPEALS FOR THE THIRD DISTRICT OF TEXAS; Charles Ben Howell v Oscar Mauzy, et al.; No. 03-93-00084-CV; September 14, 1994.
[OPINION, S.W.2d]

[Note: In compliance with the rules of the US Supreme Court, the opinion of the Texas Court of Appeals is reproduced at this point. However, petitioner believes that this opinion has no direct bearing upon the questions presented to the Supreme Court; petitioner's present challenge is directed to the subsequent refusal of Justices of the Texas Supreme Court to disqualify.]

Before POWERS, JONES and KIDD, JJ; POWERS:

Charles Ben Howell appeals from a summary judgment that he take nothing on his claims against Oscar Mauzy and Anne Mauzy for their alleged failure to report certain campaign contributions and expenditures in accordance with Title 15 of the Texas Election Code. Act of May 13, 1985; 69th Leg., R.S., ch. 211 § 8, 1985 Tex. Gen. Laws 1061 (Tex. Elec. Code Ann. §§ 251.001-.019, since amended) ("Election Code").[1] Howell also appeals from a declaratory judgment the trial court rendered in the Mauzys' favor on their counterclaim. We will reverse the declaratory judgment and render judgment consistent with our opinion. We will affirm the remainder of the judgment.

---

[1] All citations to the Election Code are to the version in effect in 1986 unless otherwise indicated.

THE CONTROVERSY

After contested primary elections, Charles Ben Howell and Oscar Mauzy became the Republican and Democratic party nominees, respectively, in the 1986 election for Place One on the Supreme Court of Texas. Howell filed the present lawsuit shortly before the general election in 1986. He sought damages and injunctive relief against both of the Mauzys[2] for alleged violations of campaign contribution and expenditure reporting requirements in section 251.011 of the Election Code.[3] Under section 251.011(k) of the Code, a candidate is liable in civil damages to each opposing candidate for unreported expenditures or contributions in the election in which they should have been reported. Mauzy counterclaimed for a declaratory judgment that his filings had in fact complied with the applicable Election Code provisions. *See* Uniform Declaratory Judgments Act, Tex. Civ. Prac. & Rem. Code Ann. §§ 37.001-.011 (West 1986 & Supp. 1994).

Both Howell and Mauzy moved for summary judgment. The trial court rendered summary judgment that Howell take nothing by his claims and rendered de-

---

[2] Anne Mauzy was the treasurer for three of Oscar Mauzy's campaign funds.

[3] Howell also asserted claims under section 251.008 of the Election Code, providing opposing candidates with a cause of action for illegal contributions and expenditures.

claratory judgment in favor of Mauzy.[4] This appeal ensued.

VENUE

In his first and second points of error, Howell asserts the trial court erred in overruling his motion to transfer venue to Dallas County. Howell initially filed suit in Dallas County district court on October 17, 1986. He was unsuccessful in obtaining service of citation, and, believing the Mauzys had moved to Austin, filed suit in Travis County district court on October 22, 1986. The Mauzys eventually appeared in the Travis County suit, and filed their counterclaim for declaratory relief. At that time, Howell unsuccessfully moved to transfer venue of the Travis County suit to Dallas County.[5]

---

[4] The trial court rendered declaratory judgment as follows: (1) all of Mauzy's filings with the Secretary of State in connection with the 1986 primary and general elections were in accordance with the applicable statutes and governing regulations and there is no basis for Howell to recover damages, penalties, injunctive, or other relief; (2) Mauzy substantially complied with the campaign filing requirements of the Texas Election Code; (3) the Election Code affords no remedy for Howell regarding Mauzy's alleged conversion of campaign funds to personal use; (4) two loans which Howell alleged were illegal were authorized by the Election Code; (5) Howell did not have standing to assert the interests of the State of Texas; and (6) Howell did not have standing to assert any claims on behalf of involuntary plaintiffs named in his petition.

[5] Howell asserts he would have simply nonsuited the Travis County suit and pursued the Dallas action if the Mauzys had not filed a counterclaim in Travis County.

Howell argues that civil suits brought under Title 15 are subject to the venue provision found in former section 251.019 of the Election Code providing:

> Venue for any offense resulting from a violation of this chapter shall lie exclusively in the county of the residence of the accused, except when the accused is a nonresident of Texas, in which case venue shall lie in Travis County.[6]

Howell contends that this provision is jurisdictional and mandatory, and asserts that the Mauzys deceived him regarding the location of their residence, which Howell now claims was in Dallas at the time he filed suit in October 1986.

The Mauzys contend that section 251.019 pertains solely to criminal actions under the Election Code, and argue that the general permissive venue statute applies. *See* Tex. Civ. Prac. & Rem. Code Ann. § 15.001 (West 1986). Section 15.001 provides that a lawsuit shall be brought in the county in which all or part of the cause of action accrued or in the county of the defendant's residence. The Mauzys argue that the cause of action accrued

---

[6]The amended version of the venue provision is as follows: "Venue for *a criminal offense* prescribed by this title is the county of residence of the defendant, unless the defendant is not a Texas resident, in which case venue is in Travis County." Tex. Elec. Code Ann. § 251.004 (West Supp. 1994).

in Travis County, and further that Howell waived his right to complain about venue by filing suit in Austin.[7]

We need not decide if section 251.019 of the Election Code applies to civil suits, because we find in the record some evidence that the Mauzys had a residence in Travis County when Howell filed this lawsuit. Therefore, venue was proper in Travis County under either the permissive venue statute or section 251.019 of the Election Code.

In reviewing the trial court's ruling on a motion to transfer venue, we must consider the entire record. Tex. Civ. Prac. & Rem. Code § 15.064(b) (West 1986); *Ruiz v. Conoco, Inc.*, 868 S.W.2d 752, 758 (Tex. 1993). We need not review the evidence for factual sufficiency. *Ruiz*, 868 S.W.2d at 758. Rather, we must defer to the trial court if there is probative evidence to support the trial court's decision, even if the preponderance of the evidence is to the contrary. *Id.* Thus, "if there is any probative evidence in the entire record . . . that venue was proper in the county where judgment was rendered, the appellate court must uphold the trial court's determination." *Id.* We may reverse the judgment and remand the cause only if there is *no evidence* that venue was proper in the county of suit. *Id.*

---

[7] If the venue provision in section 251.019 of the Election Code is jurisdictional, it cannot be waived, even by consent of the parties. *See Federal Underwriters Exch. v. Pugh*, 174 S.W.2d 598, 600 (Tex. 1943); *see also Mingus v. Wadley*, 285 S.W. 1084, 1088 (Tex. 1926) (holding in special proceedings not within common-law jurisdiction statutory designation of venue is mandatory and jurisdictional).

At a hearing on Howell's motion to transfer venue and plea in abatement, Anne Mauzy testified[8] she and Oscar Mauzy had placed their Dallas home on the market in January 1986. They had moved the contents of their Dallas home to Austin in early August 1986. She stated that by October 17, 1986, the date Howell filed the Dallas lawsuit, she had moved to Austin. At that time, the Mauzys had not yet sold their Dallas home. She stated that during this time Oscar Mauzy was campaigning, and thus traveling, although he sometimes stayed at their Austin home.

Oscar Mauzy testified that he purchased the Austin home sometime in 1986, and began to stay there. When he was in Dallas during the last months of 1986, he stayed at another residence because their Dallas home was vacant and for sale.

Howell introduced two returns of service of citation in which two deputy constables stated they had attempted service on the Mauzys at their Dallas residence on October 17th and 20th, but that the house was vacant and for sale.

---

[8] The trial court noted under section 15.064(a) of the Texas Civil Practice and Remedies Code, it must determine venue questions from the pleadings and affidavits. Therefore, both Mauzys initially testified under a bill of exceptions in the hearing on the motion to transfer venue. However, the trial court subsequently admitted their testimony in connection with the hearing on Howell's plea in abatement. Unlike the trial court, this Court must consider the entire record in reviewing the trial court's ruling on the motion to transfer venue. *See* Tex. Civ. Prac. & Rem. Code Ann. § 15.064(b) (West 1986).

Based on the above summary of the evidence, we conclude there is some evidence that in October 1986, the Mauzys were in the process of moving their residence from Dallas County to Travis County. If a defendant is in the process of moving from one county to another, and his affairs are in such a state that is uncertain in which county his residence is, he may be sued in either county. *Haney v. Haney*, 307 S.W.2d 649, 653 (Tex. Civ. App.—Amarillo 1957, no writ); *Eppenauer v. Schrup*, 121 S.W.2d 473, 477 (Tex. Civ. App.—Fort Worth 1938, no writ).

For venue purposes, moreover, a defendant may have a residence in two or more counties. *Davenport v. Harry Payne Motors, Inc.*, 247 S.W.2d 452, 453 (Tex. Civ. App.—Austin 1952, no writ); *see Snyder v. Pitts*, 241 S.W.2d 136, 139 (Tex. 1951).[9] The presence of a defendant's wife living in a second place of abode is evidence of a second residence, although it does not conclusively establish a second residence as a matter of law. *Snyder*, 241 S.W.2d at 140; *Cauble v. Grey*, 604 S.W.2d 197, 199 (Tex. Civ. App.—Dallas 1979, no writ). Based on the entire record, we conclude there is some evidence that both Mauzys maintained a residence in Travis County at the time Howell filed suit. We overrule Howell's first and second points of error.

---

[9] A second residence includes the following elements: (1) a fixed place of abode within the possession of the defendant; (2) occupied or intended to be occupied over a substantial period of time; (3) which is permanent rather than temporary. *Snyder*, 241 S.W.2d at 140. The record reflects that the Mauzys purchased their Austin home and were living in it in 1987.

PLEA IN ABATEMENT

In points of error three through eight, Howell contends the trial court erred in overruling his plea in abatement. As grounds for the plea, Howell asserted the pendency of the Dallas lawsuit that he had filed five days before the Austin lawsuit. After a hearing on the plea, the trial court overruled the plea in abatement on two grounds: (1) Howell was estopped to assert the pendency of the Dallas lawsuit; and (2) Howell had abandoned the Dallas lawsuit.[10]

Generally, if two lawsuits concerning the same controversy and parties are pending in courts of coordinate jurisdiction, the court in which suit was first filed acquires dominant jurisdiction.[11] *Wyatt v. Shaw Plumbing Co.*, 760 S.W.2d 245, 248 (Tex. 1988); *Curtis v. Gibbs*, 511

---

[10] The trial court based its ruling on the following findings: (1) After the Mauzys made a general appearance in the Austin lawsuit in October 1986, Howell did not thereafter diligently seek to perfect service in the Dallas action until March 1987, some months after he had filed amended pleadings in the Austin action; (2) Howell had sought to compel the Austin trial court to issue certain orders and schedule certain hearings by filing a mandamus petition in the supreme court in October 1986 in which he alleged, "Travis County has obtained exclusive jurisdiction and venue of the cause of action"; and (3) Howell had represented to the trial court in October 1986 that he would dismiss the Dallas action if the Mauzys would appear and answer in the Austin lawsuit. On appeal, Howell attacks the first and third findings. Because we hold that the second finding is sufficient to uphold the trial court's denial of the plea in abatement, we do not address Howell's complaints about the other findings.

[11] The parties agree that the Dallas and Austin suits present the same controversy and have essentially the same parties, although Howell in May 1987 nonsuited Anne Mauzy in the Austin suit.

S.W.2d 263, 267 (Tex. 1974); *V. D. Anderson Co. v. Young*, 101 S.W.2d 798, 800 (Tex. 1937). Abatement of a lawsuit due to the pendency of a previous lawsuit is based on the principles of comity, convenience, and the necessity for an orderly procedure in the trial of contested issues. *Wyatt*, 760 S.W.2d at 248. If a party calls the second court's attention to the pendency of the first suit by a plea in abatement, that court must sustain the plea. *Curtis*, 511 S.W.2d at 267.

However, the mere physical filing of the petition is insufficient to deprive a court in which the same suit is subsequently filed of active jurisdiction. *V. D. Anderson Co.*, 101 S.W.2d at 800-01. Matters accruing subsequent to the filing of the first suit may defeat the plea in abatement. *Reed v. Reed*, 311 S.W.2d 628, 630 (Tex. 1958). In this connection, three exceptions exist to the general rule requiring abatement of the second suit: (1) a party's conduct may estop him from asserting dominant jurisdiction in another court; (2) the first court may lack power to join parties to be joined if feasible; or (3) the party filing the first suit lacks the intent to prosecute it. *Wyatt*, 760 S.W.2d at 248. If, as happened here, the second court determines that one of the exceptions applies, it may assume dominant jurisdiction and proceed to judgment.[12] *Hartley v. Coker*, 843 S.W.2d 743, 747 (Tex. App.—Corpus Christi 1992, no writ).

---

[12] The second court has jurisdiction to determine disputed fact issues connected with the plea in abatement. *Hartley v. Coker*, 843 S.W.2d 743, 747 (Tex. App.—Corpus Christi 1992, no writ). If that court overrules the plea in abatement, it has dominant jurisdiction over the controversy unless and until an appellate court reverses its ruling on the plea in abatement. *Curtis*, 511 S.W.2d at 267; *Russell v. Taylor*, 49 S.W.2d 733, 738 (Tex. Comm'n App. 1932, opinion adopted).

Howell does not dispute that in October 1986, soon after he filed both lawsuits, he sought a writ of mandamus from the supreme court to compel the Travis County district court to hold a hearing in the case, and in his petition for the writ he expressly represented that Travis County had obtained exclusive jurisdiction of the cause of action. Moreover, we note that at a hearing on October 27, 1986, counsel for Howell represented to the Travis County district court that "jurisdiction of this matter is now in Austin." We conclude that the trial court did not err in overruling the plea in abatement on the ground that Howell was estopped to assert the pendency of the Dallas lawsuit as a basis for abatement of the Travis County suit.

Moreover, a party must raise a plea in abatement in a timely manner or it is waived. *Wyatt*, 760 S.W.2d at 248; *see Cleveland v. Ward*, 285 S.W. 1063, 1071-1072 (Tex. 1926), *overruled on other grounds*, *Walker v. Packer*, 827 S.W.2d 833, 842 (Tex. 1992). Courts may examine the equities of the situation in deciding whether the plea is timely filed. *Develo-Cepts, Inc. v. City of Galveston*, 668 S.W.2d 790, 793 (Tex. App.—Houston [14th Dist.] 1984, no writ); *Bluebonnet Farms, Inc. v. Gibraltar Sav. Ass'n*, 618 S.W.2d 81, 84 (Tex. Civ. App.—Houston [1st Dist.] 1980, writ ref'd n.r.e.). Howell did not file the plea in abatement until April 1987, some months after he sought to compel the Travis County District Court to take action in the case, and after he filed an amended petition in December 1986. This is not a situation in which Howell was unaware of the facts supporting a plea in abatement. *See Develo-Cepts, Inc.*, 668 S.W.2d at 793 (holding plea in abatement not untimely after two-and-one-half years during which parties conducted discovery which provided information necessary to urge plea). Howell chose to pursue actively the Travis County litigation while aware of

the pendency of the Dallas suit, before asserting a plea in abatement. We conclude Howell's plea in abatement was untimely. We overrule Howell's points of error three through eight.

TRANSFER FROM DALLAS TO AUSTIN

In his fifty-seventh point of error, Howell asserts that Judge Guy Jones[13] erred in abating and transferring the Dallas County lawsuit to Travis County. In November 1988, Judge Jones convened a hearing at New Boston, in Bowie County, on the Mauzys' plea in abatement and motion to transfer venue in the Dallas suit. Judge Jones subsequently ordered the Dallas suit abated and transferred to Travis County. The Travis County district court then ordered the two cases consolidated. Howell contends Judge Jones violated article V, section 7 of the Texas Constitution by conducting proceedings in Bowie County for a suit pending in Dallas County.

Section 7 of Article V deals with judicial districts and district judges and provides in part: "The Court shall conduct its proceedings at the county seat of the county in which the case is pending, except as otherwise provided by law." Tex. Const. art. V, § 7. The record reflects that the case was never transferred to the district court in Bowie County, but at all times was pending in the 134th

---

[13] The regional presiding judge in Dallas, Judge Ron Chapman, appointed Judge Guy Jones to preside in the Dallas suit. Judge Jones was the district judge for the 202nd District Court of Bowie County. Howell raises numerous complaints about the process of appointment, but because we will sustain his fifty-seventh point of error, we do not address these complaints.

district court of Dallas County.[14] The trial judge stated repeatedly that he was acting as judge of the 134th District Court.

A district-court judge has no power to adjudicate the rights of litigants except at the time and places prescribed by the law for holding court. *Lyons-Thomas Hardware Co. v. Perry Stove Mfg. Co.*, 27 S.W. 100, 109 (Tex. 1894); *Ex parte Lowery*, 518 S.W.2d 897, 900 (Tex. Civ. App.—Beaumont 1975, orig. proceeding). The Texas constitution requires a district court to conduct proceedings only at the county seat of the county in which the case is pending.[15] *Bridgeman v. Moore*, 183 S.W.2d 705, 708 (Tex. 1944); *Turner v. Tucker*, 258 S.W. 149, 150 (Tex. 1924); *Isbill v. Stovall*, 92 S.W.2d 1067, 1072 (Tex. Civ. App.— Eastland 1936, no writ); *cf. Whitner v. Belknap*, 34 S.W. 594, 596 (Tex. 1896) (holding unconstitutional a statute establishing Bowie County district court in Texarkana instead of in county seat in New Boston).[16] A district

---

[14] The trial court stated that the matter was then pending in Dallas County, Texas and had been set for hearing "by agreement of Counsel" pursuant to the Local Rules of Practice of the 202nd District Court. In its order, the court stated that it was "sitting by designation as Judge of the 134th District Court of Dallas County, Texas."

[15] The county seat is the place where the county courthouse is located. *Bridgeman*, 183 S.W.2d at 708. In *Bridgeman*, the supreme court held there was substantial compliance with the constitution when the judge signed the judgment at his residence instead of at the courthouse in open court. *Id.* Unlike Bridgeman, the proceedings in the present case were held outside the district and the county.

[16] *Whitner* construed an earlier version of article V, § 7 providing: "[The district judge] shall hold the regular terms of his court at the county seat of each county in his district. . . . " *Whitner*, 34 S.W. at 596.

court has no jurisdiction to conduct proceedings outside the county in which suit is pending. *Isbill*, 92 S.W.2d at 1071. Thus, if the court renders judgment or issues an order while sitting outside the county in which suit is pending, such judgment or order is void. *Lowery*, 518 S.W.2d at 902; *Berner v. Berner*, 146 S.W.2d 1017, 1018 (Tex. Civ. App.—Galveston 1941, writ dism'd judgm't cor.); *Isbill*, 92 S.W.2d at 1072. Such a defect in jurisdiction may not be remedied by the consent or agreement of the parties. *Isbill*, 92 S.W.2d at 1071.[17]

There is an exception to the rule stated in Section 7 of article 5: "except as otherwise provided by law." Tex. Const. art. V, § 7. The legislature added this language by constitutional amendment in 1949 in order "to permit the legislature to confer greater flexibility in cases pending in districts embracing two or more counties." Tex. Const. art. V, § 7 interpretive commentary; *see also Barnhart Indep. Sch. Dist. v. Mertzon Indep. Sch. Dist.*, 464 S.W.2d 197, 201 (Tex. Civ. App.—Austin 1971, writ ref'd n.r.e). Subsequently the legislature enacted a statute pertaining

---

The court interpreted this provision to mandate that regular terms of the district court shall not be held elsewhere than the county seat. *Id.*

[17] It appears from the trial-court order and the statement of facts from the hearing that the trial judge was of the opinion that Howell's counsel either agreed to have the hearing in Bowie County, or waived his objections by not raising them before the hearing. The order stated: "[Howell] filed with the Court on November 21, 1988 an objection to the hearing being held in this matter outside the boundaries of Dallas County, Texas and the Court being of the opinion that said objection was not well-taken and further that any such objection had been waived by the plaintiff and his counsel, said objection was overruled." The court apparently believed Howell waived the objection by not raising it sooner.

to multicounty districts. *See* Tex. Gov't Code Ann. § 24.017 (West 1988). Section 24.017 permits the judge of a multicounty district court to hear and determine certain matters and sign judgments and orders connected with those matters "in any county in his judicial district." Tex. Gov't Code Ann. § 24.017(b)(1)-(3).[18] The statute also authorizes a district judge assigned to a multicounty district to take the same actions "in the manner provided by this section for the regular judge. . . . " Tex. Gov't Code Ann. § 24.017(d) (West 1988). Section 24.017 only applies within judicial districts composed of more than one county. *See* Tex. Gov't Code Ann. § 24.017(a) (West 1988).[19] Thus, section 24.017 did not authorize Judge Jones to conduct, in Bowie County, proceedings connected with a

---

[18] Specifically, the judge may (1) hear and determine all preliminary and interlocutory matters in which a jury may not be demanded; (2) hear and determine uncontested or agreed cases and contests of elections pending in his district, unless a party to the suit objects; and (3) sign all necessary orders and judgments in those matters. Tex. Gov't Code Ann. § 24.017(b).

[19] Some cases have held that section 24.017 authorizes a district judge who is assigned to another district to conduct proceedings in the assigned case in his home district. *See Phagan v. State,* 510 S.W.2d 655, 662-63 (Tex. Civ. App.—Fort Worth 1974, writ ref'd n.r.e.) (overruling point of error complaining that rendition of judgment in different district than that in which case pending violated constitution because record did not show where judgment rendered and because article 1919 § 2 [now § 24.107] expressly authorized action); *Winton v. Davenport,* 275 S.W.2d 725, 727 (Tex. Civ. App.—Fort Worth 1955, no writ) (holding article 1919 authorized visiting judge to overrule his own order granting new trial when he was back in his home district); *see also Lowery,* 518 S.W.2d at 903-04 (Stephenson, J., dissenting). However, as stated in the text of our opinion, section 24.017 plainly applies solely within multicounty judicial districts.

suit pending in Dallas County.[20]

Because the trial court conducted the hearing on the motion to transfer venue and plea in abatement outside the county in which suit was pending in violation of article V section 7 of the Texas constitution, its order abating the cause and transferring venue to Travis County is void. We sustain Howell's fifty-seventh point of error.

In light of our disposition of Howell's fifty-seventh point of error, we need not address his points nine through fourteen complaining of error in the order to transfer venue of the Dallas suit to Travis County; his points fifteen through eighteen concerning error in the consolidation of the Travis County and Dallas suits; and points fifty-five and fifty-six concerning error in the appointment of Judge Jones.

SUMMARY JUDGMENT ON ELECTION CODE VIOLATIONS

In points of error nineteen through fifty, Howell asserts the trial court erred in rendering summary judgment that he take nothing by his claims against the Mauzys for five alleged campaign contribution or expenditure reporting violations under section 251.011 of the Election Code. The trial court granted both Oscar Mauzy's and Anne Mauzy's motions for summary judgment and subsequently rendered final judgment in Octo-

---

[20] Judge Jones heard the motion to transfer and plea in abatement in the 202nd judicial district, which is composed solely of Bowie County. Tex. Gov't Code Ann. § 24.381(a) (West 1988). The case was pending in the 134th Judicial District, composed of Dallas County. Tex. Gov't Code Ann. § 24.236(a) (West 1988).

ber 1992.[21]

The movant for summary judgment has the burden to show there are no genuine issues of material fact and that the movant is entitled to judgment as a matter of law. Tex. R. Civ. P. 166a(c); *Wornick, Co. v. Casas*, 856 S.W.2d 732, 733 (Tex. 1993); *Nixon v. Mr. Property Management Co.*, 690 S.W.2d 546, 548 (Tex. 1985). A defendant moving for summary judgment must show as a matter of law that the plaintiff has no cause of action against him. *Citizens First Nat'l Bank v. Cinco Exploration Co.*, 540 S.W.2d 292, 292 (Tex. 1976). In reviewing a summary judgment, we must accept as true all evidence favorable to the nonmovant, and indulge every reasonable inference and resolve all doubts in favor of the nonmovant. *Wornick*, 856 S.W.2d at 733. The dispositive question on appeal is not whether the summary judgment record raises fact issues,

---

[21] The route by which the trial court rendered final judgment is convoluted. By order dated March 24, 1988, the trial court granted Oscar Mauzy's amended motion for summary judgment, and subsequently rendered a purported final judgment on April 18, 1988. At that time, Anne Mauzy was not a defendant in the suit because Howell had nonsuited her. On appeal, this Court held that the judgment was interlocutory and dismissed the appeal for want of jurisdiction. *See Howell v. Mauzy*, 774 S.W.2d 274, 276 (Tex. App.—Austin 1989, writ denied). After dismissal, Judge Guy Jones ordered the Dallas suit abated and transferred to Travis County, at which time the Travis County district court ordered the two suits consolidated. Because Anne Mauzy had remained a defendant in the Dallas suit, she became a defendant in the consolidated suit. Although we have held that the order transferring the Dallas suit to Travis County was void, Howell amended his petition after consolidation, and added Anne Mauzy as a defendant. On Anne Mauzy's motion, the trial court rendered a partial summary judgment in her favor. The trial court subsequently rendered final judgment based on its previous summary judgments as to both Oscar and Anne Mauzy.

but whether the summary judgment proof establishes as a matter of law that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law. *Gibbs v. General Motors Corp.*, 450 S.W.2d 827, 828 (Tex. 1970).

The Mauzys asserted in their motions multiple grounds for summary judgment, and the trial court did not specify in its orders the grounds on which it granted the motions.[22] In such a situation, we will affirm the judgment if it is supported by any ground the Mauzys expressly asserted in their motions. *Community Mut. Ins. Co. v. Owen*, 804 S.W.2d 602, 604 (Tex. App.—Houston [1st Dist.] 1991, writ denied).

Oscar Mauzy asserted the following grounds, among others, in his amended motion for summary judgment: (1) Howell is without standing to challenge contributions or expenditures involved in the Democratic primary; (2) under section 251.011(k) of the Election Code, Howell may only recover for "unreported" contributions and expenditures and all of the alleged violations Howell identified were in fact reported; (3) all of Mauzy's filings were in compliance with the applicable statutes and gov-

---

[22] Oscar Mauzy filed a motion for summary judgment, and later, an amended motion for summary judgment. Under Texas Rule of Civil Procedure 65, when a pleading is amended, the original pleading should no longer be regarded as part of the record. However, the trial court apparently treated the amended motion as a supplemental motion and issued two orders, granting each of the motions. The amended motion for summary judgment asserted the grounds contained in the original motion, as well as several other grounds.

erning regulations of the Secretary of State;[23] (4) the Election Code provides no remedy for Howell to recover for alleged conversion of campaign funds to personal use.[24] Anne Mauzy's motion for summary judgment asserted that the previous interlocutory summary judgments in favor of Oscar Mauzy disposed of all issues that Howell asserted against her.[25]

On appeal, Howell contends that the trial court erred in rendering summary judgment on five alleged campaign-contribution and expenditure-reporting violations. We will address his complaints with regard to each of the five violations in connection with the applicable ground for summary judgment.

Standing

In points of error thirty-nine, forty, forty-five and forty-six, Howell asserts the trial court erred in holding

---

[23] Under the 1986 version of the Election Code, the Secretary of State had the authority to interpret and administer the provisions of Title 15. Election Code § 251.017(g)(4).

[24] Mauzy also asserted in his amended motion for summary judgment that: he had substantially complied with all campaign filing requirements; all of his contributions, loans, or expenditures were lawful and consistent with applicable statutes; Howell has no standing to seek damages, penalties or injunctive relief for the causes of action he asserts; Howell has no standing to assert the interests of the State; Howell has no standing to assert the interests of parties not before the court; and Howell cannot show injury in fact or in law that would entitle him to recover.

[25] Howell does not dispute this assertion.

that he had no standing to assert a cause of action against the Mauzys for alleged campaign-contribution and expenditure-reporting violations connected with the Democratic primary election. The Democratic primary on May 3, 1986 led to a primary runoff election on June 7, 1986. Three of the alleged violations occurred during the primary election: (1) A $3,000 transfer from one campaign fund to another campaign fund in December 1985; (2) a $225,000 personal loan from Republic Bank to Oscar Mauzy in December 1985; and (3) a $225,000 loan from Allied Bank in April 1986.

Howell's cause of action arose under the following provision of the Election Code:

> Any candidate or campaign treasurer or assistant campaign treasurer of a political committee who fails to report in whole or in part any contribution or expenditure as provided in the foregoing provisions of this Section shall be liable for double the amount or value of such unreported contribution or expenditure or unreported portion thereof, *to each opposing candidate in the election in which same should have been reported.* Each of such opposing candidates shall also recover reasonable attorneys' fees for collecting the above liquidated damages.

Election Code § 251.011(k) (emphasis added).

The Mauzys contend that Howell was not Mauzy's opposing candidate during the Democratic primary elections, and therefore, even assuming the loans or the transfer were improperly reported, Howell has no standing to assert a cause of action for Mauzy's alleged failure to

report contributions or expenditures in the primary election. Howell argues that the primaries were merely "elimination rounds" in the single election that also encompassed the general election of November 1986. He contends that any expenditures or contributions connected with the primaries were part of the process leading up to the general election in which he opposed Mauzy, and because he and Mauzy were in the same election, Howell therefore has standing to challenge reporting violations connected with the primaries.[26]

The statute defines "election" as "any election held to *nominate or elect* a candidate to public office." Election Code § 251.001(6) (emphasis added). By its plain language, the statute rejects Howell's theory by providing that a primary election is an "election" under section 251.011(k), and not an "elimination round" in the general election. Thus, only those candidates who opposed Mauzy in the primary election have standing to challenge his alleged reporting violations in that

---

[26] Howell also asserts that the loans were "involved" in the general election because anything Mauzy did in order to win the primary was part of the process of winning the general election. Howell's source for this argument is Election Code section 251.008 providing: "Any person who knowingly makes or knowingly accepts an unlawful campaign contribution . . . shall be civilly liable to each opposing candidate whose name appeared on the ballot in the election in which the unlawful contribution or expenditure was *involved* . . . . " (Emphasis added). This section provides civil liability for *unlawful* campaign contributions or expenditures, not for unreported contributions or expenditures as in section 251.011(k). Howell states in his brief that he does not contend the loans were unlawful, but that Mauzy failed to comply with statutory disclosure requirements. Therefore, the language in section 251.008 is inapplicable.

election.[27] Because Howell did not become Mauzy's opposing candidate until after the primary election, he has no standing under section 251.011(k) to challenge reporting violations that occurred during the primary.[28] We overrule Howell's thirty-ninth and fortieth points of error.

In light of our holding that Howell has no standing to challenge the reporting of contributions and expenditures in the primary election, we do not address his points of error nineteen through twenty-one, twenty-five through twenty-seven, and forty-one, assigning error to the court's summary judgment regarding the bank loans and the $3,000 transfer between campaign funds.

Election Code Provides No Remedy

In points of error thirty-one through thirty-three, Howell asserts the trial court erred in rendering judgment in the Mauzys' favor on Howell's claim that Mauzy con-

---

[27] Section 251.011(k) confers standing to challenge reporting violations on "each opposing candidate *in the election in which same should have been reported.*" Section 251.011(4)(B)(i) directs every opposed candidate to file "three sworn statements *relating to the election in which such person is involved* . . . not later than the 30th day prior to the election, not later than the 7th day prior to the election, and not later than the 30th day after the election, respectively."

[28] Howell also argues that such an interpretation of the statute leaves a "huge gap" because if there is an uncontested primary, no one may challenge the unopposed candidate's reporting of expenditures and contributions. To the contrary, section 251.011(1) provides for civil liability in such cases to the State of Texas; section 251.011(j) provides for criminal liability.

verted campaign funds to personal use. Specifically, he asserts Mauzy spent $2,750 on personal moving expenses from Dallas to Austin. Mauzy responds that, even assuming such allegations are true, the Election Code provides no remedy for Howell.

Section 251.007 states: "A person who accepts a contribution as a candidate or office-holder shall not convert such contributions to personal use except as authorized by the State Ethics Advisory Commission." Election Code § 251.007(a). Section 251.007 does not provide an opposing candidate with a remedy, but instead states that "[a] person who converts a contribution to his personal use in violation of this section is civilly liable to the State of Texas for an amount equal to the amount of the converted contribution plus reasonable court costs." Election Code § 251.007(d). Thus, the trial court correctly rendered summary judgment on Howell's claim for damages for Mauzy's alleged use of campaign funds for personal use. We overrule Howell's points of error thirty-one through thirty-three. In light of this holding, we do not address Howell's forty-third and forty-ninth points of error raising other complaints regarding the trial court's rendition of summary judgment on Howell's conversion claim.

Compliance with Election Code Reporting Requirements

In points of error twenty-two through twenty-four, Howell asserts the trial court erred in granting summary judgment in favor of the Mauzys on his claim that they failed to report a $9,083.75 interest payment on the $225,000 loan from Allied Bank addressed above. Oscar

Mauzy was personally liable on the loan, and from his personal funds paid the interest to Allied Bank on September 26, 1986. Howell argues that because the *proceeds* of the loan were undisputedly expended for campaign purposes, an interest payment on the loan qualifies as a reportable "expenditure" under section 251.011(k).[29] The Mauzys rejoin that because Allied Bank made the loan in the due course of business to Oscar Mauzy personally, it was not a reportable contribution.[30] Therefore, they contend that an interest payment from Oscar Mauzy's personal funds did not constitute a campaign expenditure, but was the discharge of Oscar Mauzy's personal obligation.

Under section 251.011(k), a candidate who fails to report an expenditure is liable to each opposing candidate in the election in which it should have been reported for double the amount of the unreported expenditure. An "expenditure" within the meaning of the statute is "any payments made or obligations incurred by a candidate . . . *when such payments or obligations are involved in an elec-*

---

[29] Although the loan proceeds were expended during the primary elections, Mauzy made the interest payment a little over a month before the general election.

[30] Although Mauzy argues that personal loans made to a candidate in the due course of business are not reportable according to the Secretary of State's "1986 Political Funds Reporting and Disclosure Directive," certain information about bank loans made in the due course of business must be reported if anyone guaranteed or otherwise assisted in obtaining the loan. Election Code § 251.011(c)(1)(D). The summary judgment record indicates that the Allied Bank loan was guaranteed by several individuals, which information Mauzy did report.

tion." Election Code § 251.001(5)(A) (emphasis added). Thus, the issue is whether the interest payment from Mauzy's personal funds on the Allied Bank loan was a payment "involved in an election." The meaning of the phrase "involved in an election" has the same meaning as in section 251.001(4). Election Code § 251.001(5).

Section 251.001(4)(A) provides:

> "[A]n individual or group of persons is *involved in an election* upon the . . . making of an expenditure which was *given or made and received with the intent that it be used or held for some election,* and that the . . . receipt of or making of the contribution or expenditure may occur before, during or after an election. . . . "

Howell contends that because the loan proceeds were expended for campaign purposes, an interest payment on the loan from Mauzy's personal funds was a payment "involved in an election." Such a contention overlooks the plain meaning of the statute which states that a person is involved in an election upon making an expenditure with the intent that it be used or held for some election. A payment to a bank from a candidate's personal funds that discharges a personal obligation is not made "with the intent that it be *used or held for some election,"* even if the candidate expended the loan *proceeds* in an election campaign. We overrule Howell's points of error twenty-two through twenty-four. Because we hold that the interest payment was not "involved in an election" we do not address Howell's point of error forty-four.

Expenditures Not Unreported

In points of error twenty-eight through thirty, Howell asserts the trial court erred in rendering summary judgment on Howell's claim that Mauzy failed to comply with the statutory reporting requirements in connection with credit-card expenditures.

Section 251.011(c)(1)(B) of the Election Code requires campaign expenditure reports to include the full name and address of the recipient, the date of the expenditure, the amount, and the purpose. The summary-judgment record reveals that Mauzy reported several campaign expenditures by reporting a date, a credit card company as a payee, an amount, and a purpose, such as "travel expense."

Regarding the "date of expenditure," Election Code section 251.011(c)(6) provides: "[A]n expenditure need not be considered to have been made until the amount is readily determinable, or if the character of the expenditure is such that the normal business practice is not to disclose the amount until the next periodic bill is received, then the expenditure need not be considered to have been made until the date of receipt of the bill." Section 4.04(3) of the Secretary of State's *1986 Political Funds Reporting and Disclosure Directive* provided that "a charge on a credit card is readily determinable at the time it is incurred since the person charging knows the amount of the obligation at the time the obligation is created." Howell contends the dates Mauzy reported are "obviously" the dates he paid the charges, not the true transaction

date.[31]

Section 251.011(k) provides that a candidate "who fails to report in whole or in part any . . . expenditure *as provided in the foregoing provisions of this Section* shall be liable for double the amount or value of such *unreported . . . expenditure or unreported portion thereof.*" (Emphasis added.) The Mauzys assert section 251.011(k) only imposes civil liability on a candidate for "unreported" expenditures. They argue that Mauzy did report all of the expenditures about which Howell complains, and that Howell is merely dissatisfied with the detail of the reports. Howell asserts that if a candidate fails to comply in any detail with the statutory reporting requirements as interpreted by the Secretary of State, the expenditure is "unreported" within the meaning of section 251.011(k).

Assuming Mauzy reported the date he paid the credit card bill as opposed to the true transaction date, the issue is whether those expenditures were "unreported" within the meaning of the statute.

In construing a statute, we must ascertain and follow the legislature's intent. *Citizens Bank v. First State Bank, Hearne*, 580 S.W.2d 344 (Tex. 1979); *Minton v. Frank*, 545 S.W.2d 442, 445 (Tex. 1976). We determine legislative intent by looking at the language of the statute. *Jones v. Del Andersen & Assocs.*, 539 S.W.2d 348, 350 (Tex.

---

[31] An example of the reported expenditure dates are as follows: for "Visa," 6/7, 7/1, 8/9, 8/12, 8/27, 8/27, 8/27, 10/6, 11/5, 11/26, 12/29; for "Mastercard," 6/7, 6/25, 7/1, 7/23, 8/8, 8/8, 8/21, 9/9, 9/15, 10/6, 10/18, 11/19, 12/3, 12/4, 12/18, 12/31, 12/31.

1976). Courts are responsible for giving a true and fair interpretation of the enactment as written, and not an interpretation that is exaggerated, forced, or strained, but one that the ordinary meaning of the words will fairly sanction and clearly sustain. *Commissioners Court v. Criminal Dist. Attorney, Caldwell County*, 690 S.W.2d 932, 936 (Tex. App.—Austin 1985, writ ref'd n.r.e.). A court should strictly construe a statute imposing a penalty. *Agey v. American Liberty Pipeline Co.*, 172 S.W.2d 972, 974 (Tex. 1943); *State v. International & G.N. Ry.*, 179 S.W. 867, 868 (Tex. 1915). Such a statute should be construed against those seeking to impose the penalty and in favor of those on whom such penalties would be imposed. *Branaum v. Patrick*, 643 S.W.2d 745, 749 (Tex. App.—San Antonio 1982, no writ).

By its plain language, section 251.011(k) imposes civil liability on a candidate who "fails to report" expenditures as provided in the preceding provisions of the section. The liability is measured by the amount of the "unreported" portion. We conclude that a candidate who reports the date he or she paid the credit card bill instead of the date of the transaction has not failed to report the expenditure, and such an expenditure is not "unreported" under section 251.011(k).

Howell also complains Mauzy reported the expenditure to the credit-card company, and not to the true vendor, and that Mauzy did not meaningfully disclose the purpose of the expenditure. Mauzy reported numerous expenditures in 1986 from June 7th through December 31st by listing the payee as a credit card company, and the purpose as, for example, "travel expense." Howell rests

his contention on a letter of interpretation the Secretary of State published in the Texas Register in June 1988. 13 Tex. Reg. 2855 (1988). In this letter the Secretary of State interpreted Title 15 to require candidates to disclose the true vendor and not the intermediate credit-card company, to disclose the purpose in a meaningful way, and to indicate the type of services or goods obtained or the reason the money was spent. *Id.* We note that this letter was published close to two years after the election in November 1986, and after the trial court granted Mauzy's amended motion for summary judgment in March 1988.[32]

The letter of interpretation is a general statement of policy rather than a binding rule. *See* 1 Frank E. Cooper, *State Administrative Law*, Ch. VII at 174-76 (1965).[33] Moreover, the Secretary of State did not intend a retroac-

---

[32] Additionally, the letter interpreted the Election Code as amended in 1987, although the Secretary of State was of the opinion that the 1987 amendment did not substantively change this area of the law. 13 Tex. Reg. 2855, 2856 (1988).

[33] Interpretive rules are those that interpret and apply the provisions of the statute under which an agency operates. *See* Cooper, *supra*, at 174-75. "No sanction attaches to the violation of an interpretive rule as such; the sanction attaches to the violation of the statute, which the rule merely interprets. . . . Some interpretive rules serve much the same purpose as opinions of general counsel for the agency. . . . They state the interpretation of ambiguous or doubtful statutory language which will be followed by the agency unless and until the statute is otherwise authoritatively interpreted by the courts." *Id.* at 175; *see also*, Alfred C. Aman, Jr. & William T. Mayton, *Administrative Law*, § 4.2.2, at 86 (West 1993) (noting that policy statements do not establish binding norms and are marked by the absence of a substantial impact on existing rights and obligations).

tive application of the policy except on a voluntary basis. This is indicated by the fact that the letter encourages rather than commands candidates to amend previously filed reports to comply with the requirements in the letter, and the direction that "[t]he rulings of this directive will be incorporated into the rules defining significant noncompliance promulgated under the Texas Election Code § 251.034(e)." Therefore, we will not apply the 1988 policy on a retroactive basis when the Secretary of State did not intend to do so. Such an application would subject an unknown number of people to a new civil and criminal liability. We overrule Howell's points of error twenty-eight through thirty. Because we hold that the credit-card expenditures were not unreported, we do not address Howell's forty-second point of error.

Because we will affirm the summary judgment in the Mauzys' favor on Howell's claims, we do not address Howell's fifty-first point of error asserting that the trial court erred in overruling Howell's motion for summary judgment on his claims.

DECLARATORY JUDGMENT

In his fifty-fourth point of error, Howell asserts the trial court erred in overruling his motion for summary judgment that Mauzy take nothing on his counterclaim under the Declaratory Judgments Act. *See* Uniform Declaratory Judgments Act, Tex. Civ. Prac. & Rem. Code Ann. §§ 37.001-.011 (West 1986 & Supp. 1994).[34] He con-

---

[34] Although Oscar Mauzy did not move for summary judgment on his counterclaim for declaratory relief, in its order on Mauzy's amended motion for summary judgment, the trial court rendered declaratory judgment in Mauzy's favor. Texas Rule of Civil Procedure 166a(c)

tends Mauzy was not entitled to a declaratory judgment because Mauzy requested no relief that could not have been obtained through a disposition of Howell's pending suit and that the counterclaim was merely a vehicle to recover attorney's fees and frustrate non-suit.[35]

Generally, the Declaratory Judgments Act is not available to settle disputes already pending before the court. *BHP Petroleum Co. v. Millard*, 800 S.W.2d 838, 841 (Tex. 1990); *Texas Liquor Control Bd. v. Canyon Creek Land Corp.*, 456 S.W.2d 891, 895 (Tex. 1970). Texas courts apply this rule whether the claim for declaratory relief is asserted in a separate proceeding or as a counterclaim in the same proceeding. *HECI Exploration Co. v. Clajon Gas Co.*, 843 S.W.2d 622, 639 (Tex. App.—Austin 1992, writ denied); *see also Staff Indus., Inc. v. Hallmark Contracting, Inc.*, 846 S.W.2d 542, 547-48 (Tex. App.—Corpus Christi 1993, no writ) (holding trial court erred in allowing declaratory-judgment counterclaim that presented no issues beyond those raised in original suit); *Hitch-*

---

requires the motion for summary judgment to "state the specific grounds therefor." Howell raises no complaint in this regard, and we are precluded from addressing unassigned points of error. *See Vawter v. Garvey*, 786 S.W.2d 263, 264 (Tex. 1990); *San Jacinto River Auth. v. Duke*, 783 S.W.2d 209, 210 (Tex. 1990). We also note that Howell himself moved for summary judgment that Mauzy take nothing under his counterclaim for declaratory relief, and thus the issue was expressly before the trial court.

[35] Howell preserved error on this point by raising it before judgment in his motion for summary judgment on the counterclaim, and arguing it in the hearing on the motions for summary judgment. *See HECI Exploration Co. v. Clajon Gas Co.*, 843 S.W.2d 622, 638 (Tex. App.—Austin 1992, writ denied).

cock Properties, Inc. v. Levering, 776 S.W.2d 236, 239 (Tex. App.—Houston [1st Dist.] 1989, writ denied) (stating declaratory-judgment counterclaim sought on an affirmative defense pleaded in original suit was improper). A counterclaim that presents no new controversy, but exists solely to pave the way to an award of attorney's fees is improper. *Hitchcock Properties*, 776 S.W.2d at 239; *John Chezik Buick Co. v. Friendly Chevrolet Co.*, 749 S.W.2d 591, 595 (Tex. App.—Dallas 1988, writ denied).

A court may allow a declaratory-judgment counterclaim, however, if it is something more than a mere denial of the plaintiff's claim and has greater ramifications than the original suit. *See BHP Petroleum*, 800 S.W.2d at 841-42; *HECI Exploration Co.*, 843 S.W.2d at 638. A counterclaim has greater ramifications than the original suit if it seeks affirmative relief. *HECI Exploration Co.*, 843 S.W.2d at 638-39. A counterclaim states a claim for affirmative relief if it alleges that the defendant has a cause of action independent of the plaintiff's claim, on which the defendant could recover benefits, compensation, or relief, even if the plaintiff were to abandon or fail to establish his cause of action. *BHP Petroleum*, 800 S.W.2d at 841.

In his counterclaim, Mauzy requested the court to declare that:

> *any claims that the plaintiff Charles Ben Howell has standing to raise* under the Texas Election Code with respect to the reports filed or the campaign activities of the defendant ,Oscar Mauzy *that all such reports and activities by the defendant* Oscar Mauzy have been conducted in accordance with the applicable provisions of the Texas Elec-

> tion Code and the regulations of the Secretary of State thereunder. Defendant prays by way of counter-claim *with respect to all issues raised by plaintiff's pleading herein* . . . that there be a final declaration by the Court that the activities of the defendant Oscar Mauzy have been in conformity with the applicable governing law.

(Emphasis added.) Mauzy's counterclaim was expressly confined to denying liability on the claims Howell raised in his pleadings, and did not seek independent relief. Mauzy argues that his counterclaim for declaratory judgment was proper because of his legitimate fear that Howell would bring future actions, regardless of the outcome of the pending controversy. *See* 1 *Texas Civil Practice* § 4.11 at 422 & n.118 (Diane M. Allen et al. eds., 1992 ed.) (citing *Kieran v. Johnson-March Corp.*, 7 F.R.D. 128 (D.C.N.Y. 1945)).

It is true that declaratory-judgment counterclaims are proper if a declaratory judgment would have the effect of settling future disputes between the parties. *See BHP Petroleum*, 800 S.W.2d at 842 (allowing declaratory-judgment rendered on counterclaim that defined parties' obligations under ongoing contract for the foreseeable future); *Winslow v. Acker*, 781 S.W.2d 322, 328 (Tex. App. —San Antonio 1989, writ denied) (holding trial court did not err in allowing declaratory-judgment counterclaim that would settle all future disputes regarding royalties under deed). In the instant case, Howell and Mauzy have no ongoing relationship; the events that are the subject of this suit were a one-time occurrence that are fully covered by the original suit. *See HECI Exploration Co.*, 843

S.W.2d at 639; *John Chezik Buick*, 749 S.W.2d at 595.

Because Mauzy's declaratory-judgment counterclaim presented no new controversy, we sustain Howell's fifty-fourth point of error.

ATTORNEY'S FEES

In his points of error sixty-one through sixty-eight, Howell asserts the award of attorney's fees to the Mauzys was improper. In its final judgment, the trial court awarded the Mauzys attorney's fees in the amount of (1) $10,000 to Oscar Mauzy in accordance with a previous interlocutory judgment; (2) $16,475 to Oscar Mauzy based on the stipulations of the parties;[36] and (3) $4,625 to Anne Mauzy.[37]

In his sixty-fifth point of error, Howell asserts the trial court erred in awarding Anne Mauzy attorney's fees because she did not plead for attorney's fees. *See* Tex. R. Civ. P. 301 (providing judgment of court shall conform to pleadings). The Mauzys' amended answer and counterclaim filed December 29, 1989, stated: "Defendant fur-

---

[36] Although the parties stipulated to the usual and customary amount of attorney's fees that the Mauzys incurred since this Court dismissed the previous appeal, the stipulation was subject to Howell's objection that the Mauzys were not legally entitled to recover any attorney's fees.

[37] The trial court awarded Oscar Mauzy $10,000 for attorney's fees incurred before the previous appeal. The trial court awarded the remaining amounts to Anne and Oscar Mauzy for attorney's fees incurred after this Court dismissed the previous appeal.

ther prays by way of counterclaim cause that he have and recover attorney's fees and costs in connection with this declaration of rights and/or under the provisions of the Texas Election Code." The prayer states: "Anne and Oscar Mauzy respectfully pray that Plaintiff take nothing by his suit; for their cost herein; *for reasonable attorney's fees,* and for such other relief to which they may be entitled." (Emphasis added).

All pleadings shall be construed to do substantial justice. Tex. R. Civ. P. 45. The record does not reflect that Howell specially excepted to the Mauzys' amended answer and counterclaim. In the absence of special exceptions, we must construe a pleading in favor of the pleader. *Roark v. Allen,* 633 S.W.2d 804, 809 (Tex. 1982); *Lawyers Sur. Corp. v. Royal Chevrolet, Inc.,* 847 S.W.2d 624, 627 (Tex. App.—Texarkana 1993, writ denied). A pleading is sufficient if it gives fair and adequate notice to the opponent. *See Roark,* 633 S.W.2d at 810; *Lawyers Sur. Corp.,* 847 S.W.2d at 627. Technical rules of pleading cannot defeat a right substantially alleged. *Barnes v. Patrick,* 146 S.W. 154, 155 (Tex. 1912). We conclude that Anne Mauzy pleaded sufficiently for attorney's fees. We overrule Howell's sixty-fifth point of error.

Howell complains in his sixty-seventh and sixty-eighth points of error that the trial court erred in awarding attorney's fees to Anne and Oscar Mauzy under the Declaratory Judgments Act because the trial court improperly allowed the counterclaim for declaratory relief. *See* Tex. Civ. Prac. & Rem. Code Ann. § 37-009 (providing court may award reasonable and necessary attorney's fees in proceeding under chapter 37). In its final judg-

ment, the trial court awarded Anne Mauzy and Oscar Mauzy attorney's fees in the amounts of $4,625 and $16,475, respectively, in accordance with the parties' stipulations.[38] Of these amounts, the parties stipulated that Anne Mauzy incurred $1,275 and Oscar Mauzy incurred $7,200 for obtaining a declaratory judgment. Because we have held the trial court improperly allowed the declaratory judgment counterclaim, we sustain Howell's sixty-seventh and sixty-eighth points of error with regard to the $1,275 and $7,200 the Mauzys incurred in pursuing the counterclaim. *See, e.g., HECI Exploration*, 843 S.W.2d at 639 (holding attorney's fee award under Declaratory Judgment Act unauthorized because counterclaim presented no new controversy); *John Chezik Buick*, 749 S.W.2d at 594 (holding declaratory-judgment counterclaim existing solely to pave the way for attorney's fees improper).

In his sixty-second point of error, Howell asserts the trial court erred in awarding Oscar Mauzy attorney's fees exceeding $10,000. He argues that the parties agreed on March 24, 1988, that $10,000 was a reasonable attor-

---

[38] In the earlier judgment from which Howell first appealed, the trial court awarded Oscar Mauzy $10,000 "for obtaining the declarations of law as set out on March 24, 1988. . . . " However, in the final judgment from which Howell now appeals, the trial court stated that the $10,000 award was in accordance with an interlocutory judgment. That interlocutory judgment awarded the $10,000: "for services performed in obtaining the summary judgments that were entered in this cause on March 24, 1988." Thus, although the trial court initially awarded Oscar Mauzy attorney's fees for obtaining a declaratory judgment, in the final judgment the court awarded fees generally for services performed in the case.

ney's fee for prosecuting Mauzy's counterclaim, and that the amount in the judgment exceeded the agreed-upon sum. We note, however, that on July 17, 1992, the parties stipulated that the usual and customary attorney's fee that Oscar Mauzy incurred since this Court dismissed the previous appeal was $16,475, the exact amount the trial court awarded Oscar Mauzy. We overrule Howell's sixty-second point of error.

In his sixty-sixth point of error, Howell asserts the trial court erred in awarding Oscar Mauzy $16,475 in attorney's fees for defending against Howell's claim because no pleadings supported the judgment. *See* Tex. R. Civ. P. 301. As discussed above, Mauzy requested attorney's fees in his amended answer and counterclaim filed on December 29, 1989, pleading that he was entitled to attorney's fees under the provisions of the Texas Election Code.[39] Of the amount the trial court awarded Oscar Mauzy based on the party's stipulations, $9,275 was the amount Mauzy incurred in defending against Howell's claim. We overrule Howell's sixty-sixth point of error.

In light of our disposition of Howell's sixty-second, sixty-fifth, sixty-sixth, sixty-seventh, and sixty-eighth points

---

[39] Section 254.231(d) provides: "Reasonable attorney's fees incurred in a suit may be awarded to the defendant if judgment is rendered in the defendant's favor." Tex. Elec. Code Ann. § 254.231(d) (West Supp. 1994). This provision was effective September 1, 1987, after Howell filed suit. Howell does not assert that section 254.231 is inapplicable to this suit, and we note that in the absence of express legislative intent to the contrary, laws merely affecting procedure or remedies may be applied restrospectively. *Davis v. State,* 846 S.W.2d 564, 570 (Tex. App.—Austin 1993, no writ).

of error, we do not address his points of error sixty-one, sixty-three, and sixty-four raising other complaints about the trial court's award of attorney's fees to the Mauzys.

Because of our disposition of the points of error specified above, we do not address Howell's remaining points of error.

CONCLUSION

We reverse the portions of the judgment awarding the Mauzys relief on their declaratory judgment counterclaim, and the attorney's fees awarded in connection with that counterclaim, and render judgment that they take nothing in that regard. We affirm the remainder of the judgment.

JUDGMENTS AND ORDERS

THE SUPREME COURT OF TEXAS; Charles Ben Howell v Oscar Mauzy, et al.; No. 94-1293; March 30, 1995.

[ORDER]

Today, the Supreme Court of Texas denied the above referenced application for writ or error, as amended with the notation "Writ Denied." 90(c) petition is granted. Petitioner's motion for recusal or disqualification of certain judges, as supplemented, motion for relief from the court's rule of four, and motion for disclosure of campaign disclosure reporting practices of the justices are overruled.

THE SUPREME COURT OF TEXAS; Charles Ben Howell v Oscar Mauzy, et al.; No. 94-1293; April 27, 1995.

[ORDER]

Today, the Supreme Court of Texas overruled petitioner's motion for rehearing of the application for writ of error in the above styled case. Petitioner's motion for rehearing of motion for recusal or disqualification of certain justices, as supplemented, is overruled. Petitioner's motion for rehearing of motion for relief from the court's rule four is overruled. Petitioner's motion for rehearing of motion for disclosure of campaign disclosure reporting practices of the justices is also overruled.

COURT OF APPEALS FOR THE THIRD DISTRICT OF TEXAS; Charles Ben Howell v Oscar Mauzy, et al.; No. 3-93-084-CV; September 14, 1994.

[JUDGMENT]

THIS CAUSE came on to be heard on the transcript of the record of the court below, and the same being considered, because it is the opinion of this Court that there was no error in the trial court's judgment except as to the order of the district court of Dallas County transferring the Dallas County cause to the district court of Travis County and as to the relief awarded appellees Oscar Mauzy and Anne Mauzy on their declaratory judgment counterclaim and the attorney's fees awarded them in connection with the counterclaim.

IT IS THEREFORE considered, adjudged and ordered that the order of the district court of Dallas County transferring the Dallas County cause to the district court of Travis County is void, that the district clerk of Travis County transfer the files in the Dallas County cause to the district court of Dallas County, that the portions of the trial court judgment that awards Oscar Mauzy and Anne Mauzy relief and attorney's fees on their declaratory judgment counterclaim are reversed, and that judgment is rendered that the Mauzys take nothing in regard to their declaratory judgment counterclaim. In all other respects, the judgment of the trial court is affirmed. It is FURTHER ordered that the appellant Charles Ben Howell, as principal, and Robert S. Bean and J. H. Bean, as sureties on the amended appeal bond herein, pay one-half of the costs of this appeal; that appellees Oscar

Mauzy and Anne Mauzy pay one-half of the costs of this appeal; and that this decision be certified below for observance.

DISTRICT COURT, TRAVIS COUNTY, 353RD DIST.; Charles Ben Howell v Oscar Mauzy, et al.; No. 406,958; October 14, 1992.

[JUDGMENT]

The Court having previously entered interlocutory summary judgments in this cause, denying all relief to the plaintiff Charles Ben Howell granting defendants declaratory relief, and the parties having entered a stipulation governing the remaining issues of attorney's fees. The Court hereby enters its final judgment disposing of all issues in this cause as follows. It is ORDERED AND ADJUDGED:

1. The plaintiff Charles Ben Howell shall take nothing by this action and his action is dismissed with prejudice.

2. The defendants shall have and recover declaratory relief as provided in this Court's earlier interlocutory summary judgments.

3. The defendant Oscar Mauzy shall have and recover from the plaintiff Charles Ben Howell the sum of $10,000 in attorney's fees in accordance with this Court interlocutory judgment of October 3, 1990.

4. Based upon the stipulation of the parties the

defendant Oscar Mauzy shall have and recover additional attorney's fees from the plaintiff Charles Ben Howell in the amount of $16,475.00.

5. The defendant Anne Mauzy shall have and recover from the plaintiff Charles Ben Howell attorney's fees in the amount of $4,625.00.

6. All relief not specifically granted is hereby DENIED.

It is the final judgment of this Court that plaintiff Charles Ben Howell shall take nothing by his action, and that his action be dismissed with prejudice, and the defendants have and recover declaratory relief as previously described, and shall have and recover attorney's fees in the total amount of $31,100.00 from the plaintiff Charles Ben Howell, for which sum execution shall issue. All costs of court are taxed against the plaintiff Charles Ben Howell.